313 U.S. 568

FILED
MAR 6 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 816

ERNEST NEWTON KALB, PETITIONER,

VS.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, RESPONDENTS.

PETITION AND BRIEF

For Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

ELMER MCCLAIN,
Lima, Ohio,
WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

INDEX

PETITION

For Writ of Certiorari

I. A Summary Statement of the Matter Involved ... 1

II. Statement of the Basis of the Jurisdiction of This Court ... 3

III. The Questions Submitted ... 4

IV. Reasons Relied Upon for Allowance of the Writ of Certiorari ... 4

Prayer ... 7

BRIEF

In Support of the Petition for a Writ of Certiorari

The Report of the Decision Below ... 9

Grounds on Which the Jurisdiction of This Court Is Invoked ... 9

Statement of the Case ... 9

Specification of Errors ... 13

Summary of Points in Argument—

Summary of Point 1 ... 14

Summary of Point 2 ... 14

Argument—

Point 1 ... 15

The Procedure ... 15

Assuming the District Court Was Acting under Authority of Section 75 ... 16

Assuming the District Court Was Not Acting under Section 75 ... 16

The Effect of the Restraining Order Is to Nullify the Decision of This Court in Kalb vs. Feuerstein, 308 U. S. 433 ... 17

Point 2 17
The Procedure 17
The Affidavit of Henry Feuerstein 19
The Affidavit of Conciliation Commissioner George H. Belton 20
The Petitioner Complied with the Farmer Debtor Law and Obeyed the Orders of the Bankruptcy Court 23
Due Process of Law 27
Opinion of the Judge of the Bankruptcy Court Examined 30
The Opinion of the Appellate Court Examined 33
Conclusion 36

TABLE OF CASES

Adair vs. Bank, 303 U. S. 350 16
Ballard vs. Hunter, 204 U. S. 241 29
Coe vs. Armour, 237 U. S. 413 29
Holden vs. Hardy, 169 U. S. 366 29
John Hancock vs. Bartels, 308 U. S. 180 31
Kalb vs. Feuerstein, 116 F. 2d 775 ..... 1-2, 3, 4, 9
Kalb vs. Feuerstein, 308 U. S. 433 ..... 2, 4, 10, 11, 13, 17, 21, 22, 27, 36
Kline vs. Burke Construction Company, 260 U. S. 226 16
Louisville vs. Radford, 295 U. S. 555 ..... 10, 18, 23
Morgan vs. U. S., 304 U. S. 1 28
Twining vs. New Jersey, 211 U. S. 78 29
Windsor vs. McVeigh, 93 U. S. 274 29

STATUTES AND RULES CITED

Section 75, Bankruptcy Act, 11 U. S. C. 203 ..... 1, 12, 14, 15, 16, 19, 20, 23, 27, 31, 32
Subsections (a) to (r) 17, 20, 25, 34
Subsection (s) (original) 10, 17, 20
Subsection (s) (present) 10, 17, 20, 23, 25, 34, 35
Subsection (s) (2) 16
Subsection (s) (4) 16
Subsection (s) (5) 21, 23

Act of February 13, 1925, Ch. 229; 28 U. S. C. 350 4
Judicial Code, Section 240 (a); 28 U. S. C. 347 (a) 3
Judicial Code, Section 262; 28 U. S. C. 377 3
Title 28, U. S. C. 41 17

AUTHORITIES CITED

12 Corpus Juris "Constitutional Law" 29
6 Ruling Case Law, Section 442 28

Supreme Court of the United States

OCTOBER TERM, 1940.

No. _____.

ERNEST NEWTON KALB, PETITIONER,

VS.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

(The brief in support of this petition begins at page nine.)

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

A Summary Statement of the Matter Involved.

This petition arises out of Section 75 of the Bankruptcy Act; 11 U. S. C. 203, relating to farmer debtors. The decision below is reported as *Kalb* v. *Feuerstein*, 116

F. 2d 775, and it appears at page 39 of the record. The opinion of the bankruptcy court which was sustained by the court below is found at page 22 of the record. The final orders of the bankruptcy court which were the subjects of the appeal below are at pages 26 to 28 of the record.

The petitioner is a farmer debtor who mortgaged his farm to the respondents. The petitioner, the respondents, and the farm here involved were also involved in Cases 120 and 121, October Term, 1939, decided by this court on January 2, 1940, and reported as *Kalb* v. *Feuerstein*, 308 U. S. 433, on appeal from the Supreme Court of Wisconsin. This court there held that because of the pendency of the petitioner's farmer debtor proceeding in the bankruptcy court the following acts of the County Court of the State of Wisconsin in a foreclosure action were unlawful and void: (1) Confirmation of sale to the respondents as mortgagees; (2) the execution of a sheriff's deed to them; (3) the writ of assistance issued at their request; (4) the ejectment of the petitioner and his family from the farm; and (5) placing the respondents in possession.

The status of the foreclosure action remains precisely as it was when this court declared the acts of the state court to be unlawful and void. The mortgage holders (the respondents here) still continue their unlawful possession. The farmer debtor (the petitioner here) has not been able to regain possession of his farm because the bankruptcy court below has restrained him from entering upon it (R. 28, folio 36).

When the state court ejected the petitioner from his farm, his farmer debtor proceeding was pending before the conciliation commissioner of the bankruptcy court. After the mandate issued from this court to the Supreme Court of Wisconsin an examination of the docket of the bankruptcy court disclosed that the farmer debtor proceeding had been dismissed without any notice or hearing whatever. The docket showed that the conciliation commissioner without notice recommended that the bankruptcy court dismiss the case and that court dismissed

it on the same day, just five days after the state court had ejected the petitioner and put the respondents in possession (R. 10, folio 12, R. 11, folio 13, also R. 14, last whole paragraph of folio 17). Thereupon the petitioner filed in the bankruptcy court his petition and amended petition for rehearing of the order of dismissal and for reinstatement of his farmer debtor proceeding (R. 12-13, R. 13-17).

The bankruptcy court denied reinstatement and also restrained the farmer debtor from entering on his farm (R. 26-27, folio 34, R. 28, folio 36). Opinion of the bankruptcy court: (R. 22-26). The farmer debtor appealed from both orders of the bankruptcy court (R. 28, folio 39, R. 30, folio 40). The Appellate Court affirmed the order of the bankruptcy court denying reinstatement, but took no action upon the order restraining the farmer debtor from entering upon his farm (R. 45). *Kalb* v. *Feuerstein*, 116 F. 2d 775: (R. 39).

The petitioner contends that the dismissal of his farmer debtor proceeding without notice and without hearing on the same day that the conciliation commissioner without notice recommended such dismissal, while the litigation was pending in the state courts and in this court to determine the legality of his ejectment should not deprive him of the benefits of Section 75.

He also contends that he has the right to the immediate possession of his farm and he bases his contention upon the decision of this court holding that his ejectment by the state court was unlawful and void.

II.

Statement of the Basis of the Jurisdiction of This Court.

The jurisdiction of this court stems from the general power conferred by Judicial Code, Section 262; 28 U. S. C. 377. It is conferred by Judicial Code, Section 240 (a); 28 U. S. C. 347 (a). The petitioner has complied with

Section 8 (a) of the Act of February 13, 1925, Ch. 229; 28 U. S. C. 350.

The decision of the circuit court of appeals was announced on November 8, 1940, and is reported as *Kalb* v. *Feuerstein,* 116 F. 2d 775 (R. 39). A petition for rehearing was denied January 8, 1941 (R. 65). The mandate of the court below was stayed to March 10, 1941 (R. 69).

III.

The Questions Submitted.

Two simple questions are submitted:

1. Could the bankruptcy court lawfully enjoin the petitioner from entering upon his farm in the face of this court's final determination that he and he alone had the right of possession and that the possession of the respondents was unlawful and void.

2. Could the bankruptcy court lawfully dismiss the farmer debtor proceeding without notice and without hearing.

IV.

Reasons Relied Upon for Allowance of the Writ of Certiorari.

First. As to the Restraining Order.

The order restraining the petitioner from going upon his farm is not merely without authority. It is in direct conflict with the express decision of this court in *Kalb* v. *Feuerstein,* 308 U. S. 433, which holds that the petitioner, and he alone, has the lawful right of possession. This court in that decision further expressly held that the possession of the respondents is unlawful and void. Indeed the judge of the bankruptcy court who issued the restraining order stated there was no power or authority to issue it. The following is quoted from the "Opinion on Motion to Reinstate" which appears at rec-

ord pages 22 to 26, folios 31 to 34. The quotation appears at record page 25, being the first paragraph:

> "The situation resolves itself to this: If the petion of Kalb for reinstatement of his proceedings under Section 75 is granted, then clearly the court has the necessary power and jurisdiction to enter an order respecting the property in question; **but if the court declines to reopen the proceedings and declines to vacate the order of this court dated March 17, 1936, then there is nothing before this court, and there would be no power or authority to enter a restraining order.**" The emphasis is supplied.

The order of the bankruptcy court that it had no jurisdiction over either the farmer debtor or his farm in denying reinstatement was directly contradictory to its assumption of jurisdiction over both in issuing the restraining order.

Even if the bankruptcy court had recognized its jurisdiction by reinstating the case it could not lawfully have restrained the farmer debtor from entering upon his farm. This court has repeatedly held that the purpose of the law is to maintain the farm as a going concern with the farmer debtor remaining in possession so that he may have opportunity to rehabilitate himself.

Second, As to the Denial of Reinstatement of the Farmer Debtor Proceeding.

The petitioner has been deprived of due process of law while he was litigating his right to the possession of his farm so that he might maintain his farmer debtor proceeding, the bankruptcy court by dismissing that proceeding rendered the entire litigation useless. The abstract legal right to enter into possession of his farm was of no practical value to him if he could not maintain it by pursuing his farmer debtor proceeding. In effect, the decision of the Supreme Court of the United States was rendered moot before it was announced by the prior order of dismissal entered *sua sponte* by the bankruptcy court.

The record of world events which has been unfolding during the past decade justifies the faith of our fathers in the fundamental principle of Anglo-Saxon jurisprudence, due process of law. The people refused to adopt the Constitution without assurance that the ancient doctrine of due process would be expressly incorporated in it. The fifth amendment was for that reason adopted. Two generations later they broadened its application in the fourteenth amendment. That no person shall be deprived of life, liberty or property without due process of law is the surest guarantee of the faith of the people in their government and therefore of its stability.

In ten unanimous decisions interpreting the farmer debtor law this court has required that the purpose of the law shall be observed—that the courts shall endeavor, not merely to obey the letter of the law but to execute the broad purpose intended to be accomplished by its spirit.

The reasoning offered by the respondents to justify the dismissal of the farmer debtor's proceeding without notice and without a hearing (during the very time he, as an impoverished litigant, was exerting every effort in the state and federal courts to regain possession of his farm) seems to the petitioner to be a specious argument which would emasculate the law he seeks the right to invoke. The petitioner asks that his farmer debtor proceeding be restored to the status it had when the bankruptcy court dismissed it.

The orders of the bankruptcy court, which have been sustained by the appellate court, are in direct conflict with the uniform decisions of this court and of the other federal courts.

If this anomalous restraining order should become the accepted rule, henceforth, many decisions of this court may be practically annulled by restraining orders issued out of a district court of the United States.

If a farmer debtor proceeding may be dismissed by a bankruptcy court without notice and without hearing the same day that a conciliation commissioner without

notice files a recommendation, a principle of American jurisprudence of far-reaching importance has been set aside.

The departure from the accepted and usual course of judicial procedure is especially important in this instance. The petitioner as farmer debtor was assiduous in complying with every requirement of the court and of the conciliation commissioner. The lengthy and costly litigation the petitioner was obliged to take grew out of the unlawful acts of the respondents. The report of the conciliation commissioner recommending dismissal of the proceeding was filed in the bankruptcy court just five days after the state court had forcibly and unlawfully ejected him and his family and seems to have been a result of that unlawful act. This report of the conciliation commissioner to the bankruptcy court was filed without any notice to the petitioner. The bankruptcy court on the same day issued the order of dismissal without notice or hearing.

The relation between the petitioner and the respondents is now precisely as it was when the respondents as mortgagees secured the ejectment of the petitioner as mortgagor and farmer debtor. The petitioner should be restored to his land and permitted to have the benefits of the farmer debtor law.

Wherefore your petitioner prays that a writ of certiorari may issue to the Circuit Court of Appeals for the Seventh Circuit commanding it to certify and send to this court a transcript of the record and proceedings thereon to the end that this cause may be reviewed and determined by this Honorable Court and for all other relief as may be proper.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio,
WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

Dated: February 24, 1941.

BRIEF

In Support of the Petition for a Writ of Certiorari.

THE REPORT OF THE DECISION BELOW.

The decision of the court below appears at page 39 of the record and it is reported as *Kalb* v. *Feuerstein*, 116 F. 2d 775. The opinion of the bankruptcy court is found at page 22 of the record.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The basis of the jurisdiction of this court and the reasons relied upon for allowance of the writ have been set forth at pages 3 to 7 of the preceding petition for certiorari.

STATEMENT OF THE CASE.

In 1933 the respondents obtained a judgment in foreclosure against the petitioner's farm in the County Court of Walworth County, Wisconsin (R. 18, fourth paragraph).

While the farm was being advertised for sale by the state court the petitioner filed in the bankruptcy court on October 2, 1934, his farmer debtor petition under Section 75 of the Bankruptcy Act (R. 4 and 5). The petition was approved and referred to the conciliation commis-

sioner for Walworth County (R. 6, R. 8, bottom of page). The efforts of the farmer debtor to effect composition or extension failed because the respondents who held the mortgage refused to accept his proposal or to negotiate further. Report of conciliation commissioner (R. 8, top of page).

On June 27, 1935, after the decision in *Louisville* v. *Radford,* 295 U. S. 555, which held the original Section 75 (s) to be unconstitutional was announced, the conciliation commissioner made his final report and on the same day the bankruptcy court dismissed the farmer debtor's petition (R. 6 to 8, R. 9).

On August 28, 1935, the present Section 75 (s); 11 U. S. C. 203 (s), became effective. Nine days later on September 6, 1935, the appellant filed his petition reciting the decision in *Louisville* v. *Radford,* and praying for reinstatement (R. 9). On the same day an order was entered by the bankruptcy court vacating the previous order of dismissal, reinstating the case, and again referring it to the conciliation commissioner (R. 10).

While the farmer debtor proceeding was pending in the bankruptcy court after reinstatement the following events occurred in the state court: (1) the state court confirmed the sheriff's sale in foreclosure to the respondents as mortgagees (R. 14, third paragraph)[1] (R. 22, bottom of page). (2) The sheriff delivered his deed to the respondents (R. 14, fourth paragraph, R. 22, bottom of page). (3) The state court issued a writ of assistance to the respondents. (4) On March 12, 1936, the sheriff forcibly ejected the petitioner, and (5) put the respond-

---

[1]The date, September 6, 1935, at record page 14, third paragraph, is a misprint for September 16, 1935. See *Kalb* v. *Feuerstein,* 308 U. S. 433, in the first paragraph of the opinion at the bottom of page 435, where the date of confirmation by the state court is stated to be September 16, 1935.

ents in possession of the farm[2] (R. 14, fourth paragraph, R. 23, top of page).

On March 17, 1936, just **five days after the sheriff had ejected the petitioner from his farm and put the respondents in possession** (R. 14, fourth paragraph, R. 23, top of page), the conciliation commissioner, without giving any notice, filed another final report (R. 10, bottom of page). On the same day the bankruptcy court dismissed the farmer debtor proceeding without notice or hearing (R. 11, bottom of page).

The petitioner has been out of possession of his farm and the respondents have occupied it continuously for five years, that is, ever since the unlawful ejectment by the sheriff on March 12, 1936 (R. 14, third whole paragraph). The issue of the right to the possession of the farm was in litigation in the courts of Wisconsin and in this court until the decision of this court in *Kalb* v. *Feuerstein*, 308 U. S. 433, on January 2, 1940. Following the

---

[2]The events referred to all occurred in Walworth County, Wisconsin, a rural community of about 30,000 population. That they were not without widespread public knowledge and interest is indicated by their nature as set forth in the record in case No. 121, October Term, 1939, before this court in *Kalb* v. *Feuerstein*, 308 U. S. 433. That record contains a copy of the complaint filed by the petitioner against the respondents and others in the state court. At page 5 of the record in case No. 121, appears paragraph number 1 which reads as follows:

> "1. This plaintiff alleges that on the 12th day of March, 1936, the defendant, George O'Brien, and divers other persons wrongfully, and unlawfully entered upon the plaintiff's premises hereinbefore described, and in the presence of the plaintiff's wife and family, broke into the dwelling house, and with force and arms did assault and beat and abuse this plaintiff by striking and hitting him, that as a result of such abuse blood flowed from the plaintiff's head, and the said George O'Brien, together with divers other persons, they being his agents, servants and employees, did force this plaintiff and his family out of their home, and did force them into automobiles and remove the plaintiff and his family from the premises hereinbefore described."

announcement of that decision, the petitioner, having discovered that his farmer debtor proceeding had been dismissed, applied to the bankruptcy court for a rehearing of the dismissal order of March 17, 1936, and for reinstatement in order that he might have the benefits of Section 75 (R. 12 to 13, R. 13 to 17).

While this application was pending the respondents sought an order from the bankruptcy court to restrain the petitioner from entering on his farm (R. 3, bottom of page, R. 24, top of page). The bankruptcy court declined to issue such a restraining order giving as a reason that there was no power or authority to do so (R. 25, top of page, R. 26, last paragraph of the opinion). After a full hearing and a careful consideration of the circumstances of the original dismissal the bankruptcy court denied the petitioner's application for reinstatement (R. 26, next to last paragraph of opinion, R. 2, last two paragraphs of "Order Denying Application For Rehearing and Reinstatement"). Later, on the oral motion of the respondents, the bankruptcy court restrained the petitioner from entering on his farm (R. 28)

The opinion of the judge of the bankruptcy court on the application for rehearing and reinstatement and on the application for a restraining order is found at record pages 22 to 26. The final order of the bankruptcy court, denying reinstatement is at record pages 26 to 27. The final order restraining the appellant from entering upon his farm, which was granted upon the oral application of the appellees, is at record page 28.

On appeal the circuit court of appeals below affirmed the order of the bankruptcy court denying the application for reinstatement. The Appellate Court did not specifically pass upon the restraining order saying:

> "We do not see how either party to this appeal would be benefited by a decision of this quesion and we shall not discuss or decide it" (R. 39 to 44).

SPECIFICATION OF ERRORS.

1.

The petitioner respectfully contends that the bankruptcy court was without any power or authority to issue a restraining order to restrain him from going upon his farm to which he has an unassailable right of possession by the decision of this court in *Kalb* v. *Feuerstein*, 308 U. S. 433. The petitioner conceives that the bankruptcy court was as devoid of power to restrain him from entering upon his farm as it was devoid of power to remove him if it had found him there. Consequently he also contends that the Appellate Court should have reversed that restraining order.

2.

The petitioner further respectfully contends that the bankruptcy court should have reinstated his farmer debtor case and thus remedied the wrong done him in dismissing it without notice to him and without hearing on the same day the conciliation commissioner filed a report recommending such dismissal which report was likewise made without any notice. The petitioner therefore contends that the Appellate Court erred in affirming the dismissal order of the bankruptcy court.

SUMMARY OF POINTS IN ARGUMENT.

SUMMARY OF POINT 1.

(Briefed at Pages 15 to 17.)

It is elementary that the bankruptcy court could not restrain the mortgagor from entering on his farm. This is true whether it had or did not have jurisdiction of the mortgagor and of his farm. If it had jurisdiction under Section 75, it could not lawfully deprive the mortgagor, as farmer debtor, of his right of possession. If it did not have jurisdiction under Section 75, it had no jurisdiction whatever.

SUMMARY OF POINT 2.

(Briefed at Pages 17 to 36.)

The petitioner is entitled to have his farmer debtor proceeding reinstated so that the mandate of the statute may be complied with.

ARGUMENT.

POINT 1.

It is elementary that the bankruptcy court could not restrain the mortgagor from entering on his farm. This is true whether it had or did not have jurisdiction of the mortgagor and of his farm. If it had jurisdiction under Section 75, it could not lawfully deprive the mortgagor, as farmer debtor, of his right of possession. If it did not have jurisdiction under Section 75, it had no jurisdiction whatever.

The Procedure.

While the petitioner's application for reinstatement was being considered by the bankruptcy court the respondents moved in writing for an order to restrain the appellant from entering on his farm. The motion stated that the appellant had gone on the farm and started to plow and harrow (R. 3, bottom of page entries of April 8, 1940, "Opinion on Motion to Reinstate," R. 24, the two paragraphs at top of page). The judge denied the motion saying in his opinion at record page 25, at the top of the page:

> "The situation resolves itself to this: If the petition of Kalb for reinstatement of his proceedings under Section 75 is granted, then clearly the court has the necessary power and jurisdiction to enter an order respecting the property in question; but **if the court declines to reopen the proceedings and declines to vacate the order of this court dated March 17, 1936, then there is nothing before this court, and there would be no power or authority to enter a restraining order."**

The motion is not found in the record because no appeal was taken from its denial.

Upon a second application, this time by oral motion, the district judge granted the identical restraining order which he had on the first application declined to issue (R. 28).

We are of the opinion that the bankruptcy court was right in denying the first application and that the issuance of the restraining order upon the subsequent oral application was clearly erroneous.

Assuming the District Court Was Acting under Authority of Section 75.

Nowhere does the act countenance the ejectment of a farmer debtor from his farm or the denial of his right of possession. On the contrary, it distinctly provides in Section 75 (s) (4) that if a receiver be in possession, the property shall be **"returned to the possession of such farmer."** Also Section 75 (s) (2) second sentence, provides that the farmer debtor shall **"retain possession"** of his property (emphasis supplied).

The law would be defeated of its sole purpose if it should be held to countenance the dispossession of farmer debtors. Its sole purpose is the **"maintenance of the farm as a going concern"** with the farmer in possession to afford adequate opportunity for him to accomplish his rehabilitation (the quotation is from *Adair* v. *Bank*, 303 U. S. 350, at 357).

Assuming the District Court Was Not Acting under Section 75.

A search for authority outside of Section 75 by which the bankruptcy court could issue such a restraining order discloses none.

District courts have no jurisdiction except as expressly granted by statute. In *Kline* v. *Burke Construction Company*, 260 U. S. 226, at top of page 234, this court observed that:

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other

court created by the general government derives its jurisdiction wholly from the authority of Congress."

All jurisdiction conferred upon District Courts of United States in set forth in detail in 28 U. S. C. 41. The jurisdiction of bankruptcy courts is even more restricted. No jurisdiction in the district court to deny the petitioner access to his farm has been suggested. None exists.

The Effect of the Restraining Order Is to Nullify the Decision of This Court in Kalb v. Feuerstein, 308 U. S. 433.

In *Kalb* v. *Feuerstein,* 308 U. S. 433, this court determined finally for all courts, state and federal, that the petitioner was unlawfully deprived of the possession of his farm by the illegal and void acts of the state court and of the respondents here. The effect of the restraining order granted upon the application of **the same mortgagees, restraining the same mortgagor, from entering on the same farm,** was to continue the unlawful possession by the mortgagees which was denounced by this court.

We suggest that this restraining order was inconsiderately granted and that the petitioner is clearly entitled to be restored to possession.

POINT 2.

The petitioner is entitled to have his farmer debtor proceeding reinstated so that the mandate of the statute may be complied with.

The Procedure.

1. On October 2, 1934, the petitioner filed his petition as a farmer debtor in the bankruptcy court and it was approved and referred to the conciliation commissioner (R. 5, R. 6, R. 2, folio 3, first three entries).

2. Although the case was then pending under Section 75 (a) to (r) for composition or extension and not under the original Section 75 (s) the pending case was dismissed after the original Section 75 (s) was held to

be unconstitutional in *Louisville* v. *Radford,* 295 U. S. 555.

3. On June 27, 1935, one month after the decision in *Louisville* v. *Radford,* 295 U. S. 555, the conciliation commissioner, George H. Belton, filed a final report of the proceedings for composition or extension (R. 6 to 8), in which he reported, among other things, that:

> "George H. Belton, conciliation commissioner . . . makes . . . his report . . .:"
>
> . . . . . .
>
> "Sixth: That at the first meeting of creditors, on the 26th day of November, 1934, which was thereafter adjourned by agreement and motion of attorneys to the 6th day of May, 1935, at 10 o'clock in the forenoon, the following appearances were made:
>
> 1. Henry Feuerstein and Helen Feuerstein, his wife, secured creditors in person." [Then follow the appearances of fifteen other creditors.]
>
> . . . . . .
>
> "Seventh. That at said meeting the debtor was examined by the conciliation commissioner and by his creditors; that **due effort was made to effect a composition or extension of time for the payment of debts; that such efforts failed because of the refusal of the principal secured creditor to accept debtor's proposal, or to enter into negotiations for adjustment."**
>
> . . . . . .
>
> "Eleventh. That there was no amended petition filed in this matter."

Because statements contained in the foregoing report were subsequently contradicted by the conciliation commissioner and by the respondents and they become important in discussing this point, the following reference to later developments is here inserted. The foregoing report of the conciliation commissioner is found in the record at pages 6 to 8 and was filed June 27, 1935. At record pages 19 and 21 appear the affidavits of Henry

Feuerstein, respondent here, and of the conciliation commissioner, George H. Belton, filed March 25, 1940 (nearly five years later).

The Affidavit of Henry Feuerstein.

Henry Feuerstein swears (at the top of page 19 of the record) as follows:

> "That the allegation in the debtor's petition that on the 14th day of May, A. D. 1934, while proceedings under Section 75 of the Bankruptcy Act were pending in this court, negotiations were being carried on by the debtor with his creditors for settlement of his debts [He means '1935' as may be seen by referring to the 'petition' referred to at record page 15, in the first whole paragraph, which reads: 'Your petitioner further represents that on the 14th day of May, 1935, while his proceedings under Section 75 of the Bankruptcy Act was pending in your court, he was negotiating with his creditors for a settlement of his debts, . . .'] is erroneous for the reason that at that time no such proceedings were pending in the federal court and that no offer of compromise of any kind or description was made to this deponent or anyone acting in his behalf."

The conciliation commissioner's report at record pages 6 to 8, and the docket entries of the bankruptcy court at the bottom of page 2 and at the top of page 3 of the record show that proceedings under Section 75 were pending on May 14, 1935, and that the debtor made a proposal which was made and considered and which failed of acceptance because "the 'principal secured creditor' Feuerstein, the respondent here, refused to accept debtor's proposal, or to enter into negotiations for adjustment" (quoted from the "Seventh" paragraph of the conciliation commissioner's report at the top of R. 8). This affidavit at record pages 18 to 21 of respondent Feuerstein further states in the first full paragraph, following folio 26 at record page 20:

> "That all times from the beginning of the foreclosure of said mortgage until the 12th day of March,

> A. D. 1936, your deponent was willing and ready to cooperate with the said debtor in any manner possible."

The foregoing statement is likewise contrary to the paragraph "Seventh" in the conciliation commissioner's report at the top of record page 8, just quoted. In fact the conciliation commissioner reported that the failure of the petitioner's proposal was wholly due to respondent Feuerstein's refusal to accept it and to enter into further negotiation.

The Affidavit of Conciliation Commissioner George H. Belton.

The affidavit of conciliation commissioner George H. Belton, which appears in the record at pages 21 and 22, contains these words in the first paragraph at folio 29:

> "That at no time during the pendency of said proceedings, either under the original petition or the reinstated petition, were any such offers made in the presence of your deponent, orally or in writing."

The foregoing statement is also contrary to the same conciliation commissioner George H. Belton's report which he made to the bankruptcy court nearly five years prior as appears at paragraph "Seventh" at the top of record page 8 where he relates that the debtor's proposal failed because respondent Feuerstein refused to accept it or to negotiate further.

4. On June 27, 1935, one day after the conciliation commissioner's final report was filed, the bankruptcy court dismissed the farmer debtor petition in the words: "It is ordered that the debtor's petition filed herein under Section 75 of the Bankruptcy Act **as amended** be and the same hereby is dismissed" (R. 9) (emphasis supplied). The petition was pending under Section 75 (a) to (r) and not under Section 75 as amended by Subsection (s).

5. On August 28, 1935, the present Section 75 (s) became effective. On September 6, 1935, the petitioner

filed his "Petition for Reinstatement" (R. 9), reciting that the new amendment "provides among other things, in Subsection S, Subdivision 5 thereof, in all cases that have been dismissed by any conciliation commissioner, referee or court, because of the Supreme Court decision holding the former Subsection (s) unconstitutional, shall be promptly reinstated" . . . He prayed that his "petition heretofore filed by him and the benefits he claimed thereunder be reinstated, and he be given relief in accordance with Section 75 thereof as amended" (R. 9).

6. On the same day, September 6, 1935, the bankruptcy court ordered that "the petition heretofore filed on the second day of October, 1934" be reinstated and it vacated "the order of dismissal of June 27, 1935." The court also re-referred the case to the same conciliation commissioner, George H. Belton (R. 10).

7. From September 6, 1935, to March 12, 1936, the various acts of the state court occurred, ending in the forcible ejectment of the petitioner, which this court held to be void in *Kalb* v. *Feuerstein,* 308 U. S. 433.

8. On March 17, 1936, **five days after the forcible ejectment of the petitioner by the sheriff,** the conciliation commissioner, without notice, filed his second final report to the bankruptcy court (R. 10) showing that he had held three creditors' meetings at which the petitioner as farmer debtor and no one else attended, as follows:

> "Second: That the first meeting of creditors was set for January 22, 1936, at 10 o'clock in the forenoon, at which time **no one appeared, excepting the applicant.** Meeting was adjourned for two weeks.
>
> Third: That on the 5th day of February, 1936, at 10 o'clock the adjourned meeting was had, at which time **no one appeared, excepting applicant,** and said meeting was continued for two additional weeks.
>
> Fourth: That on the 19th day of February, 1936, at 10 o'clock the second adjourned meeting was had, at which time **no one appeared, excepting applicant."**

9. On the same day the conciliation commissioner filed his report the bankruptcy court entered a second order of dismissal without notice or hearing.

There was no other action of the bankruptcy court between September 6, 1935, when the reinstated petition was referred to the conciliation commissioner, and February 28, 1940, when the farmer debtor applied for reinstatement. The docket of the bankruptcy court at record page 3 and the entire record show no intervening action of any sort in the bankruptcy court except the report of the conciliation commissioner on March 17, 1936, and the dismissal on the same day. All activity was transferred to the attempts of the petitioner to regain possession of his farm.

It appears obvious that the report of the conciliation commissioner without notice so soon after the ejectment of the petitioner from his farm by the state court was the result of a conclusion that the case was then a vain proceeding because the farmer had lost all right to his farm. It seems equally obvious that the dismissal by the bankruptcy court without notice or hearing on the same day the conciliation commissioner's report was filed was for the same reason. At that early period in the history of the farmer debtor law the procedures and concepts of straight bankruptcy still prevailed in many quarters. The opinion was stoutly maintained that the new law did not change the established rule that a foreclosure case pending in a state court which had proceeded to a decree before bankruptcy proceedings were instituted rendered the jurisdiction of the state court superior to that of the bankruptcy court. The exclusive permanent jurisdiction of the bankruptcy court in farmer debtor cases was not recognized in some places until the decision in *Kalb* v. *Feuerstein*, 308 U. S. 433. The State of Wisconsin was one of those places.

The Petitioner Complied with the Farmer Debtor Law and Obeyed the Orders of the Bankruptcy Court.

1. The petitioner filed his original petition under Section 75 and it was approved by the court as properly filed (R. 6).

2. Upon the reference of the case to the conciliation commissioner (R. 8) he filed an inventory of his estate, a statement as to his secured and unsecured creditors with their addresses and also a statement of his financial condition (R. 6 to 8).

3. He attended the creditors' meeting before the conciliation commissioner and submitted to examination by the conciliation commissioner and by his creditors. Report of conciliation commissioner (R. 6 to 8).

4. He made a proposal for composition or extension but the respondent Feuerstein, being the principal secured creditor, refused to accept or to enter into any further negotiations. Report of conciliation commissioner, paragraph "Seventh," at record page 8, also record page 16, folio 20. The conciliation commissioner reported "That at said meeting the debtor was examined by the conciliation commissioner and by his creditors; **that due effort was made to effect a composition or extension of time for the payment of debts; that such efforts failed because of the refusal of the principal secured creditor to accept debtor's proposal, or to enter into negotiations for adjustment"** (emphasis supplied).

5. After the bankruptcy court had dismissed his case following the decision in *Louisville* v. *Radford* and the new Section 75 (s) became effective he promptly, within nine days, prepared and filed his petition for reinstatement which was drafted in conformity with the terms of the new act in Section 75 (s) (5) providing that all dismissed cases should be "promptly reinstated." This he promptly requested and the court reinstated the case. Both the petitioner and the court followed the prescrip-

tion of the statute. The court referred the case back to the conciliation commissioner (R. 9 and 10). His report shows that from the order of reference on September 6, 1935, to January 22, 1936, nothing was done before the conciliation commissioner (R. 10 to 11).

6. The first creditors' meeting was called for January 22, 1936, "at which time no one appeared, **excepting the applicant**" (R. 11).

7. On February 5, 1936, a second, adjourned, meeting was had, "at which time no one appeared, **excepting the applicant**" (R. 11).

8. On February 19, 1936, a third, adjourned, meeting was had "at which time no one appeared, **excepting the applicant**" (R. 11).

The conciliation commissioner concludes his report (R. 10 to 11) by saying **"That the applicant failed to make any offer to creditors and failed to file an amended petition, and therefore this conciliation commissioner recommends that this petition be dismissed"** (R. 11).

9. The record is replete with references to informal attempts to settle with creditors. All other creditors, except the respondents who alone refused to accept any proposition (R. 8, paragraph at top of page) were willing to settle. "Amended Petition for Reinstatement, etc." (R. 15, beginning with the first full paragraph and continuing to the end of the paragraph at the top of page 17). "Affidavit of Henry Feuerstein" (R. 19, beginning with the second paragraph and continuing into folio 26, at R. 20).

Certainly no default is attributable to the petitioner prior to the sudden recommendation of the conciliation commissioner and the dismissal by the court all on March 17, 1936, following the illegal ejectment of the petitioner by the sheriff. It is evident that the bankruptcy court found the petition for reinstatement in proper form because the "Order of Reinstatement," at record page 10, re-

cites that "Upon reading and filing the annexed petition" the court reinstated the "petition heretofore filed" and re-referred it to the conciliation commissioner (R. 10). It was not the office of the conciliation commissioner to order the farmer debtor to file an amended petition. Neither petitions nor amended petitions are filed with a conciliation commissioner. They are filed with the clerk of the district court.

The conciliation commissioner misconceived the nature of his office. He is but a **referee** to whom the district court **refers** matters for such action as is specified in the order of reference and for report back to the district court. Proceedings may neither be initiated before a conciliation commissioner nor dismissed by him; he acts only pursuant to an order of reference. Since it is clear that he believed the proceedings were pending before him under Section 75 (a) to (r), it is difficult to understand how he could believe that the farmer debtor should file an amended petition with him before he had made his final report showing the termination of his reference thereunder.

Whether the case while pending under the reference to the conciliation commissioner was governed by Section 75 (a) to (r) or by Section 75 (s) the judge of the bankruptcy court had the petition for reinstatement and referred it as it was. If either the judge or the conciliation commissioner, upon further consideration, found a petition for adjudication also to be necessary, an appropriate order was due to be served upon the farmer debtor. If the conciliation commissioner believed he was acting pursuant to Section 75 (a) to (r) and that when he had completed his duties under Section 75 (a) to (r) an amended petition should be filed it was his duty to report his opinion to the court.

By no conception of the law could it be proper for the conciliation commissioner without notice to recom-

mend dismissal to the judge and for the judge to dismiss without notice or hearing.

As suggested in Note 2 at page 11 of this brief, it is quite likely that the ejectment actuated the conciliation commissioner. The farm of the petitioner is located in **Walworth County,** Wisconsin, and he lived upon it. "Farmer Debtor Petition" (R. 2). The conciliation commissioner was such for **Walworth County** (R. 6 to 8, R. 10 to 11). The foreclosure case was pending in the County Court of **Walworth County** and the confirmation of the foreclosure sale was there confirmed. It was the sheriff of **Walworth County** who, on March 12, 1936, ejected the petitioner from the farm and put the appellees into possession (R. 14, end of fourth paragraph). The population of Walworth County is about 30,000. It is highly probable that not only the judge and the sheriff of the county court, but the conciliation commissioner and also the clerk and the judge of the federal district court, were all of the opinion that there remained nothing upon which the case could act. It was no doubt regarded as a dry husk of legal formality from which the substance had been appropriated by the state court under its claim of prior jurisdiction assumed long before the jurisdiction of the bankruptcy court attached. Judgment in foreclosure had been entered in the County Court of Walworth County for more than a year and the farm was being advertised for sale when the farmer debtor petition was filed. "Farmer Debtor Petition" (R. 5, bottom of page).

Under ordinary bankruptcy, and indeed under the other debtor sections of the Bankruptcy Act, jurisdiction in foreclosure first obtained and proceedings conducted to final decree in a state court were not disturbed by the subsequent filing of a bankruptcy or a debtor petition. It is safe to assume that under the circumstances and the applicable law as they understand it, neither the conciliation commissioner nor the clerk nor the judge

of the bankruptcy court had any intention of depriving the farmer debtor of any legal right. They all no doubt considered the case at an end when on March 12, 1936, the petitioner was put off of and the respondents put on the farm. The dismissal five days later on March 17, 1936, was then deemed the necessary thing to do in view of the *fiat accompli* in the state court.

To the farmer debtor the application of all legal procedure had been transferred to his efforts to have the state remedy the wrong that had been done. His case, known as No. 120 in this court, was for cancellation of the sheriff's deed and for removal of the respondents from his farm. *Kalb* v. *Feuerstein*, 308 U. S. 433, at the middle of page 436.

Whatever action, or inaction, characterized the farmer debtor case in the bankruptcy court during the state litigation and the appeal to this court, it can not be said that the petitioner was guilty of any laches in assuming that the bankruptcy court would not irretrievably dismiss his farmer debtor case without prior notice to him that such action was contemplated.

Due Process of Law.

The effect of the dismissal was to deprive the petitioner of his right to have the benefits of Section 75 (s). This right has by this court been declared to be founded on the Constitution. The same Constitution in the Fifth Amendment guarantees that "no person . . . shall . . . be deprived of . . . property, without due process of law; . . ." There is no principle of law more firmly established in American and in English jurisprudence than this one. There is no exception and it is as vital a defect in judicial proceedings as the violation of the principle that a court may not act without power. An order of a court issued in violation of either of these fundamental principles is absolutely void and may be attacked at any time, at any place, by any person interested. This is

true because a court has no **power** to act except through due process of law. The bankruptcy court's dismissal without notice was as void as was the confirmation of foreclosure and the ejectment of the appellant by the Wisconsin state court. No rights have intervened to suggest any hesitancy in restoring to the petitioner what the court wrongfully deprived him of.

Due process of law has been stated in Volume 6, Ruling Case Law, in the article on Constitutional Law, Section 442, as follows:

> "The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. In fact, one of the most famous and perhaps the most often quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College case, in which he declared that **by due process of law was meant 'a law which hears before it condemns;** which proceeds upon inquiry, and renders judgment only after trial.' Somewhat similar is the statement that it is a rule as old as the law that **no one shall be personally bound until he has had his day in court,** by which is meant, until he has been **duly cited to appear, and has been afforded an opportunity to be heard"** (emphasis supplied).

In the recent case of *Morgan* v. *U. S.*, 304 U. S. 1, this court continued a long history of judicial pronouncements by holding that even in an administrative proceeding which is only quasi-judicial in character, the liberty and property of citizens must be protected by fair and open hearing. In that case there was an open hearing and argument but there was no opportunity given to the person involved to examine the order before it was issued. At page 18, this court said:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable op-

portunity to know the claims of the opposing party and to meet them."

In *Holden* v. *Hardy*, 169 U. S. 366, 389 (1897), this court said:

> "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

This pronouncement was quoted with approval and followed in *Ballard* v. *Hunter*, 204 U. S. 241 (1907), and in *Twining* v. *New Jersey*, 211 U. S. 78, 102 (1906).

In 12 Corpus Juris, "Constitutional Law," page 1228, it is said:

> **"Notice to a party** whose rights are to be affected by judicial proceedings is **an essential element of due process"** (emphasis supplied).

In *Coe* v. *Armour*, 237 U. S. 413, 426 (1914), this court said:

> "In doing this the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice."

In *Windsor* v. *McVeigh*, 93 U. S. 274 (1876), it was held that the decree of a court of equity upon oral allegations, without written pleadings would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way.

The Opinion of the Judge of the Bankruptcy Court Examined.

The opinion of the district judge is at record pages 22 to 26.

It is to be noted that the judge of the bankruptcy court who entered the final order of dismissal on March 17, 1936, at record page 11 was not the judge who considered the application for rehearing and reinstatement and rendered the opinion at record page 22. It is fully appreciated that it is not pleasant for any judge to be asked to reconsider an order entered by a predecessor on the bench. Yet "this is a government of laws and not of men."

We desire here to consider some of the observations contained in the opinion of the district judge upon the application for rehearing of the final order of dismissal and for reinstatement.

1. In the second paragraph on page 25 of the record the opinion refers to a supposed default by the farmer debtor in not making "any offer in writing." It refers to the affidavit of the conciliation commissioner which is found at record page 21, where the conciliation commissioner swears that he advised the farmer debtor that offers "had to be in writing in order to be valid" and that "at no time during the pendency of said proceedings, either **under the original petition** or the reinstated petition were any such offers made in the presence of your deponent, orally or in writing." This affidavit was made March 21, 1940. Evidently the conciliation commissioner had forgotten that nearly five years previously in his official report, dated June 26, 1935, and filed June 27, 1935 (R. 6 to 8), which report was made to the same court to which his affidavit was addressed, he had reported that "**due effort** was made to effect a composition or extension of time for the payment of debts; that such efforts failed because of the refusal of the principal secured creditor to accept **debtor's proposal,** or to enter into negotiations for adjustment."

It is also to be noted that nowhere in Section 75 is there any requirement that a proposal shall be written. The law is concerned with substance and not with the form of a proposal. There are minute provisions for the consideration and acceptance and confirmation of a proposal for composition or extension of the debts of the farmer debtor but none relative to the form of the proposal. Indeed, in the Bartels case, *John Hancock* v. *Bartels*, 308 U. S. 180, there was no written proposal.

2. It is quite evident that the opinion unintentionally and inadvertently stated inaccurately at the end of the second paragraph of the opinion at record page 25, that "At the time the commissioner's report was made on **March 11, 1936,** Kalb was still in possession of his farm." The conciliation commissioner's report was filed **March 17, 1936** (R. 10). Mr. Kalb was dispossessed on **March 12, 1936** (R. 23, top of page, R. 14, end of fourth paragraph). He was not in possession when the conciliation commissioner's report was made.

3. The following is quoted from the opinion at record page 25, third paragraph, at folio 33:

> "When Kalb submitted himself to the jurisdiction of the bankruptcy court, he and his counsel were presumed to know that such proceedings are *in rem* and not *in personam;* and all persons are presumed to have knowledge of any judgments or final orders therein. **Kalb was not denied due process any more than were the Feuersteins whose proceedings in the state court were suspended without notice to them when the original proceedings were filed in this court.** Kalb instituted the proceedings and sought the protective jurisdiction of the bankruptcy court. Creditors and lien claimants were required to take notice of these proceedings. Kalb was in the same situation" (emphasis supplied).

The sentence in the preceding paragraph which is printed in bold face type is an argument presented by

mortgage holders to courts throughout the nation in controversies arising out of Section 75. The thought is that certain legislative provisions, or results of legislative provisions, call for complementary provisions by judicial legislation. The Congress considered the problem and legislated. That legislation is final. This court has declared that the "mandate of the statute" is to be followed by the courts.

The dismissal of the proceeding in the bankruptcy court without notice is quite another situation. The proceeding was pending by authority of the law of the United States pursuant to the Constitution. Under the fifth amendment that proceeding could not be dismissed without due process of law by hearing after due notice. In the words of Chief Justice Marshall "We must remember that it is a **Constitution** that we are considering."

4. The statement at the bottom of page 25 of the record that "There is no contention or claim that the Kalbs did not have actual notice that the proceedings in this case were dismissed," is not based upon the record. Emphatically the appellant claims that he had no notice of the filing of the conciliation commissioner's final report (R. 10) or of the final order of dismissal (R. 11). **May it here be suggested that controversy over the dismissal could not have occurred if by due process of law a notice to the farmer debtor to show cause had been served and he had been in default of appearance or other action before dismissal.**

5. At the bottom of page 25 and the top of page 26 of the record the opinion reads:

> "At that time [when the order of dismissal was entered] the Kalbs owed seven years' interest on their mortgage, which interest amounted to over $2,000; and five years of delinquent taxes, amounting to approximately $1,000 had accumulated."

This, again, is an argument that has been repeatedly pressed upon the federal courts, including this court, re-

peatedly as a reason for modifying the terms of Section 75 by the courts.

The Opinion of the Appellate Court Examined.

1. A minor misstatement of fact occurs at record page 40, in the first full paragraph of the opinion of the Appellate Court where it is said that "While the proceeding was pending in the district court a mortgage foreclosure was commenced" . . . The mortgage foreclosure had been pending for a year and a half when the original petition was filed in the bankruptcy court (R. 5, last two sentences).

2. The opinion of the Appellate Court at the top of record page 42 in the paragraph running over from the previous pages, says:

> "It is difficult to see how petitioner was deprived of his right to proceed under Subsection (s) by this order of dismissal. The conciliation commissioner, in his report, stated that the appellant 'failed to file an amended petition,' and the court, in its order of dismissal, stated: 'That the debtor has failed to make an offer of composition to his creditors and also failed to file an amended petition praying for adjudication of bankruptcy.' "

At the beginning of the last paragraph on the same page (R. 42), it is said:

> "It must be conceded that if appellant's petition for reinstatement of September 6, 1935, be regarded as an application under Subsection (s), that he had from that date until March 17, 1936, to amend his petition 'asking to be adjudged a bankrupt.' It appears certain that Subsection (s) is not automatic or self-executing, but that a debtor desiring the benefits thereof must assume the initiative and meet the requirements which are imposed by the statute."

It is respectfully suggested that at the present time probably one guess is as good as another in endeavoring to determine whether the bankruptcy court considered the reinstatement on September 6, 1935, at record page 10 to

replace the case under Section 75 (a) to (r) or to put it under Section 75 (s). The conciliation commissioner seems to have considered it to have been referred to him again under Section 75 (a) to (r). In either case due process of law required notice to the farmer debtor to file a formal amended petition if it was deemed necessary. The petitioner was effectually cut off from all access to the provisions of Section 75 (s) by the dismissal.

Since this dismissal was made by the bankruptcy court upon the recommendation of the conciliation commissioner which was made without notice to the farmer debtor and the dismissal itself was without notice or hearing, the petitioner is entitled to be restored to the right he had on September 6, 1935, before the dismissal. Had the court given notice and given an opportunity to file an amended petition, he would have had due process of law. Failure to comply would rightly have authorized a final order of dismissal. Certainly, in any view, he was not to be expected or required to file with the conciliation commissioner an amended petition either before or after the conciliation commissioner made his final report under Section 75 (a) to (r).

It may be conceded that Section 75 (s) is not automatically invoked and that the farmer debtor must apply for adjudication as a farmer debtor bankrupt. But he can not divine when the proper time has arrived to file such application without having notice that the proceeding under Section 75 (a) to (r) has ended. Two proceedings, one under Section 75 (a) to (r) and one under Section 75 (s), can not pend at the same time. Does not "orderly procedure" require that the court give notice when the first proceeding has ended so that, if desired, the second may be initiated?

4. At the middle of page 43 of the record the opinion of the Appellate Court suggests that:

> "Ignoring the fact that he failed to file an amended petition with the commissioner, and assum-

ing that he was not required to do so, yet the burden rested squarely upon him to do so in the court within a seasonable time. We do not see how he was relieved of his duty in this respect from the fact that his petition was dismissed. If he had made application to file such amended petition in a reasonable time, we think the court would have been obliged to permit it. According to appellant's contention, he had no notice of the order of dismissal and this, therefore, could afford him no reason or excuse for not proceeding or attempting to proceed seasonably under Subsection (s). It is, therefore, our view that the order of dismissal did not and could not have affected the rights of appellant. He is in precisely the same position as he would have been had there been no order of dismissal."

The petitioner could not be in default if he had no notice that the case was about to be dismissed if he did not act. Had there been no order of dismissal we do not see why he should be deprived of his rights to proceed under Section 75 (s).

May it be most respectfully suggested again that it is quite probable that neither conciliation commissioner nor court intended to deprive the petitioner of any right. The color of the case then was considered to be that it had ended for all practical purposes by the eviction under what was then believed to be the paramount jurisdiction of the state court. We do not believe the conciliation commissioner would have made such a report nor do we believe the bankruptcy court would have dismissed the case without notice or hearing, if it had been foreseen that it would be finally held by this court that the eviction was a nullity.

A bankruptcy court is a court of equity and in farmer debtor proceedings the bankruptcy court is required to administer the law in accordance with its general purpose to enable farmer debtors to rehabilitate themselves. Where a mistake has been made by a court or by its officers why should it not be corrected? Correction can not harm the respondents whose rights are fully protected

by the law the farmer debtor seeks to invoke. They have for five years retained their unlawful possession, wrongfully appropriating the rents and profits of the farm. The petitioner's whole attention and energy was devoted to regaining possession of his farm and in case No. 120 he was restored to his right of possession by this court. *Kalb* v. *Feuerstein*, 308 U. S. 433. To deny to the petitioner a correction of the wrong unwittingly done him while he was seeking to maintain his right of possession subjects him to irreparable injury.

CONCLUSION.

It seems to the petitioner that the order restraining him from taking possession of his farm was improper and should be remedied.

It likewise seems to him that he has been deprived of a constitutional right by the failure to reinstate his farmer debtor proceeding and consequently that the order of the Appellate Court affirming the order of the bankruptcy court in denying reinstatement ought to be remedied.

Wherefore he prays that this Honorable Court issue a writ of certiorari to the Appellate Court.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio,
WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

Lima, Ohio,
February 24, 1941.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 816

ERNEST NEWTON KALB,

Petitioner,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN,

Respondents.

RESPONDENTS' BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. ARTHUR MORAN,
Delavan, Wisconsin,
Counsel for Respondents.

INDEX

	Page
STATEMENT	1
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. It Was Within the Inherent Power of the District Court to Preserve the Status Quo, Both as to the Parties Before the Court and the Property Involved, Pending This Appeal, by Restraining the Appellant from Entering into and Upon the Farm in Question	6
(A) The District Court Had the Power to Issue a Restraining Order Pending this Appeal	6
(B) The Power of Bankruptcy Courts to Grant Injunctional Relief is Definite	7
II. The Contention of the Petitioner That the Dismissal of These Proceedings Deprived Him of His Opportunity to Invoke the Benefits of Subsection (S) and Thus Deprived Him of His Property Without Due Process is Untenable	9
(A) A Debtor, Under Section 75, May Amend His Petition at Any Time	9
(B) The Contention of the Petitioner That the Dismissal of His Petition Deprived Him of the Benefits of Subsection (S) is Without Support in the Record	10
(C) Notice of Dismissal Need Not be Given	11
III. The Petitioner's Petition Was Properly Dismissed in View of His Failure to Make Timely Application for the Benefits of Subsection (S) of Section 75	15

Page

(A) The Contention of the Petitioner That His Proceedings Were Dismissed Because He Had Been Dispossessed Cannot be Established Except by Impeachment of the Records of the District Court 15

(B) The Failure of the Petitioner to Make and File a Written Offer to His Creditors Required the Dismissal of the Petition 16

(C) The Benefits of Subsection (S) Will be Extended Only to Those Debtors Who Make Application Therefor 18

IV. The Dismissal of Petitioner's Proceedings by the District Court is Binding and Conclusive and the Doctrine of Res Adjudicata Applies.... 19

V. The Appeal From the Order of the District Court Was Not Taken Within the Time Prescribed by the Bankruptcy Act..... 30

(A) The Time for Appeal From the Order of March 17, 1936, Expired Within 40 Days After Entry Thereof 30

(B) The Appeal From the Order of April 16, 1940, in Effect Seeks a Review of the Prior Order and Should be Dismissed..... 31

CONCLUSION 34

Table of Cases Cited

Archibald, In Re, 14 F. Supp. 437..... 25

Ballard, In Re, 10 F. Supp. 549 17

Bartels v. John Hancock Mutual Life Insurance Company, 84 L. Ed. 154 16

	Page
Cresap, In Re, 99 F. 2d 722	18
Gratiot County State Bank v. D. Lloyd Johnson, Trustee, 249 U.S. 246, 39 Sup. Ct. Rep. 263	12
Henderson, In Re, 100 F. 2d 820	27
Irving-Austin Building Corporation, In Re, 96 F. 2d 905	33
Kalb v. Feuerstein, 291 N.W. 840	2
Kalb v. Feuerstein, et al., 308 U.S. 433	2, 8, 12
Kalb v. Luce, 291 N.W. 841	2
Marcy v. Miller, 94 F. 2d 611	33
Massey v. Farmers & Merchants National Bank & Trust Company, 94 F. 2d 526	12
McMurray, In Re, 8 F. Supp. 449	18
McWilliams v. Blackard, 96 F. 2d 43	23
Mintz v. Lester, 95 F. 2d 590	32
Oyler, In Re, 20 F. Supp. 595	21
Union Joint Stock Land Bank v. Byerly, 310 U.S. 1, 60 S.C. 773	29
Vater, In Re, 14 F. Supp. 631	17
Wilcons v. Penn Mutual Life Insurance Company, 104 F. 2d 456	19

Statutes and Text Books Cited

Bankruptcy Act, Section 2 (A)	7
Bankruptcy Act, Section 2, Subs. 21 (B)	8

	Page
Bankruptcy Act, Section 25 (A)	38
1 Remington, 4th Ed. 47	11
1 Remington, 4th Ed. 50	11
15 Ruling Case Law 633	12
Title 11, U.S.C.A. 48 (a)	38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 816

ERNEST NEWTON KALB,

Petitioner,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN,

Respondents.

RESPONDENTS' BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The statement of facts contained in petitioner's brief and in the opinion of the District Court (R. 22, 26) is substantially complete.

However, counsel for the respondents desires to point out certain matters involved in this appeal in addition to the statements above referred to.

The petition of the appellant herein was first dismissed on June 27, 1935, upon the report of the conciliation commissioner, which set forth, among other things, that, "there was no amended petition filed in this matter". (R. 8-9).

It was, and as we believe, erroneously reinstated on September 6, 1935. (R. 10).

On March 11, 1936, the conciliation commissioner made his report, reciting, "that the applicant failed to make any offer to creditors and failed to file an amended petition, and, therefore, this conciliation commissioner recommends that this petition be dismissed". (R. 10, 11). Following the filing of this report, the District Judge, embodying in his order the language quoted above, dismissed the proceedings. (R. 11).

The conciliation commissioner (affidavit of conciliation commissioner, R. 21, 22), pursuant to instructions from the District Court, required that all offers by debtors to creditors under Section 75 be submitted in writing. The petitioner was so informed. The petitioner was also advised of the necessity of filing an amended petition in bankruptcy. (Affidavit of conciliation commissioner, R. 21, 22).

In October, 1937, two actions were instituted by the petitioner in the state courts of Wisconsin, one in equity, seeking to recover possession of the petitioner's farm; and the other in tort for damages. (R. 14).

The defendants demurred to the complaints, and after successive appeals to the Wisconsin Supreme Court and the Supreme Court of the United States, both cases were remanded to the Circuit Court of Walworth County, Wisconsin, for trial. (See *Kalb v. Feuerstein,* 291 N.W. 840; *Kalb v. Luce,* 291 N.W. 841; *Kalb v. Feuerstein,* et al, 308 U.S. 433).

The action sounding in tort was tried and disposed of in December, 1940, and resulted in a judgment dismissing the plaintiff's complaint on the merits as to all the defendants therein.

On February 28, 1940, the petitioner filed a petition for reinstatement of his proceedings under Section 75 of the Bankruptcy Act (R. 12), and on March 18, 1940, filed an amended petition asking for vacation of the order of dismissal entered in the District Court on March 17, 1936. (R. 13, 17).

After oral arguments had been had and counsel for the respective parties had been instructed to file written briefs, and prior to a decision by the District Judge, the petitioner went upon the premises in question and began to plow up certain clover and timothy hay planted thereon. Thereupon, counsel for the respondents moved the Court for an order restraining the petitioner from plowing up or destroying the crops on the premises in question, pending the decision of the Court. (R. 24, first paragraph).

After the court had rendered its decision refusing to vacate the order of dismissal and refusing to reinstate the proceedings under Section 75, the respondents gave notice to the petitioner of a motion to confirm the sheriff's report of sale in the foreclosure proceedings.

Thereupon, the petitioner moved the District Court for an order enjoining the respondents from proceeding with confirmation of the sheriff's report of sale, pending the perfecting of an appeal from the decision of the District Court.

The respondents thereupon renewed their original motion, and by oral stipulation it was agreed that both motions might be granted.

Counsel for the respondents, believing that the District Court was right in preserving the status quo, has not appealed from the order restraining the respondents from proceeding further in the state courts, and hence, that portion of the proceedings does not appear in the record.

At this time, therefore, the respondents are enjoining from proceeding with confirmation of the sheriff's report of sale, and the petitioner is enjoined from entering upon the farm that forms the subject matter of the litigation, until this appeal is ultimately determined. (R. 28).

SUMMARY OF ARGUMENT

I.

The District Court possessed the inherent power to preserve the status quo, both as to the parties and the property involved, pending the petitioner's appeal from the order denying reinstatement of the debtor's proceedings. Especially is this true in the light of the broad powers conferred upon bankruptcy courts.

II.

(a) The petitioner was not denied the opportunity of invoking the benefits of Subsection (S) of Section 75, but rather waived those benefits either by inaction or by intention.

(b) The contention of the petitioner that he did not know the proceedings had been dismissed is futile, inasmuch as the record shows that he made no effort to prosecute those proceedings for a period of four (4) years.

(c) In any event, bankruptcy proceedings are in rem and not in personam, and direct notice to the parties having an interest in the subject matter of the litigation is not necessary. The rule that all creditors and lien claimants are required to take notice of the various steps in the proceedings applies with equal force to the debtor.

III.

(a) The failure of the petitioner to make application within a reasonable time to be afforded the benefits of Subsection (S) of Section 75, rendered the dismissal of the proceedings necessary. The claim that the proceedings were dismissed because the petitioner had been dispossessed is entirely without support.

(b) The failure of the petitioner to make and file a proposal to his creditors justified the dismissal of the proceedings in the District Court.

(c) The benefits provided by Subsection (S) are optional with the debtor and will only be extended to those who make timely application therefor.

IV.

The order of dismissal of the debtor's proceedings was a final order, and right or wrong, became final and binding in the absence of an appeal taken within the time fixed by law. The validity of the order of dismissal cannot be collaterally attacked.

V.

(a) The appeal from the order of dismissal entered March 17, 1936, should be dismissed because it was not taken within the time fixed by law.

(b) The appeal from the order of April 16, 1940, should also be dismissed because, in practical effect, it is merely an attempt to avoid the statute fixing the time within which an appeal may be taken by moving the vacation of an order after the time for appeal therefrom has expired, and then appealing from the order denying the motion to vacate.

ARGUMENT

I. It Was Within the Inherent Power of the District Court to Preserve the Status Quo, Both as to the Parties Before the Court and the Property Involved, Pending This Appeal, by Restraining the Appellant from Entering Into and Upon the Farm in Question.

A. The District Court had the power to issue a restraining order pending this appeal.

Counsel for the petitioner has devoted a substantial portion of his brief (Pages 15 to 17, incl.) to a discussion of the lack of power in the district court to preserve the status quo pending the outcome of this appeal.

It is true, as stated at Page 15 of the petitioner's brief, that, when the District Court rendered its decision refusing to reinstate the petition, the District Judge also denied the respondents' motion for an order restraining the petitioner from entering into and upon the farm in question. This, upon the ground that the court, having refused to reinstate the petition, had no further jurisdiction.

But on the day following the filing of the formal order refusing to reinstate the proceedings, the petitioner moved

the District Court for an order restraining the respondents from proceeding to the confirmation of the sheriff's sale in the state court. The respondents thereupon orally moved for an order restraining the petitioner from disturbing possession of the farm pending the final result of this appeal. Both orders were entered pursuant to an oral stipulation between the parties.

Counsel for the petitioner contends in his brief (Pages 16 and 17) that the District Court had no power to enter the order restraining the petitioner, yet it was the petitioner who sought the jurisdiction of the District Court to obtain injunctive relief for his own protection and benefit. Having obtained that relief, he now takes the position that the court had no power or authority to grant the relief he himself asked for.

The petitioner, having invoked the jurisdiction of the District Court, certainly cannot now take the illogical position that the court had no authority or jurisdiction.

B. The power of bankruptcy courts to grant injunctional relief is definite.

At Page 16 of the petitioner's brief it is contended that no authority is contained in Section 75 granting to the bankruptcy court the power to grant injunctional relief. It is true that Section 75 contains no such grant of power in express language; but Section 75 is a part of the Bankruptcy Act and cases brought under that section must be considered in the light of the entire Act.

Section 2(a) of the Bankruptcy Act provides:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now estab-

> lished or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act * * * ."

And Section 2, Subsection 21 (b) provides:

> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

It is submitted, therefore, that in view of the broad general powers conferred upon the bankruptcy courts that the District Court had the jurisdiction and authority necessary to issue the injunctional order complained of, particularly in view of the fact that the petitioner himself invoked the jurisdiction of the court for, and obtained, a similar order.

Nor can it reasonably be said, as claimed by the petitioner, that the restraining order herein is a nullification of the decision of this Court in *Kalb v. Feuerstein,* 308 U.S. 433. That case had its inception in an action commenced in the state court. It was before this court on demurrer, and the sole question was whether the complaint on its face stated a cause of action. This Court held that a cause of action was stated and remanded the proceedings for trial on the merits.

The question here involved was not in issue in that controversy, and except as the decision in that case pronounced several general and specific rules of law pertaining to Section 75, it is not controlling here.

The injunctional order was entered for the sole and only purpose of preserving the status quo until the rights of all parties could be determined and until the petitioner's appeal could be heard. The issuance of that order and the companion order was well within the inherent power of the court to make.

II. The Contention of the Petitioner That the Dismissal of These Proceedings Deprived Him of His Opportunity to Invoke the Benefits of Subsection (S) and Thus Deprived Him of His Property Without Due Process is Untenable.

A. A debtor, under Section 75, may amend his petition at any time.

It is contended by the petitioner that he was, by the dismissal of these proceedings, deprived of his opportunity to invoke the benefits of Subsection (S) and thus deprived of his property without due process. (Petitioner's brief, page 27).

It is clear from a reading of the provisions of Subsection (S) that an amended petition under that subsection could have been filed by the petitioner at any time when it appeared that the consent of his creditors to a plan of compromise could not be obtained.

Therefore, an amended petition asking for an adjudication under Subsection (S) could have been filed on May 6, 1935, when, as the commissioner's report shows, attempts at conciliation failed, or at any time subsequent thereto and prior to the date of dismissal on June 27, 1935; or referring to the reinstated petition, at any time after January 22, 1936, when, according to the commissioner's report, no creditors appeared.

Nowhere in Section 75 can there be found any provision, express or implied, which supports the conclusion that the debtor cannot amend his petition until after the commissioner has filed his report showing that conciliation has failed.

Nor is there any provision in Section 75 which requires or permits the pendency of proceedings such as these for an interminable period.

Two courses are open to a debtor who invokes the protection of Section 75 and fails to reach an agreement with his creditors: He may amend his petition, ask to be adjudicated a bankrupt, and then avail himself of the provisions of Subsection (S); or he may, as did this debtor, abandon his proceedings and waive the benefits of Subsection (S). It is his privilege to elect whether or not to become a bankrupt. If he fails to so elect, the court has no alternative but to dismiss the proceedings.

B. The contention of the petitioner that the dismissal of his petition deprived him of the benefits of Subsection (S) is without support in the record.

It is submitted that the dismissal of the petitioner's proceedings did not deprive him of any valuable right, and that the dismissal is not the cause of the petitioner's present difficulties.

It is claimed by the petitioner at Page 32 of his brief, third paragraph, that he had no notice of the dismissal of the proceedings in the District Court. The record does not so state. His petition for reinstatement only alleges that the proceedings were dismissed *without notice,* which is a vastly different thing than a statement that the petitioner *did not know the proceedings had been dismissed.*

But as pointed out by the Circuit Court of Appeals (Opinion—R. 43), if the petitioner did not know his proceedings had been dismissed, how can he excuse his failure to act in connection therewith, or to file his amended petition under Subsection (S) for a period of four (4) years after his efforts at conciliation had failed.

The answer is obvious. For some reason known to himself, he chose to litigate the matter in the state courts

and to abandon the proceedings under Section 75. No other conclusion can reasonably be arrived at.

Counsel for the petitioner infers in his brief that it was necessary for the petitioner to determine the matter of possession in the state court before proceeding further in the federal court. Such an inference affords no excuse to the petitioner for his failure to take any steps in any court, state or federal, from March 12, 1936, when he was evicted, until October, 1937, when proceedings were started in the state court.

Nor can it be reasonably claimed that the petitioner could ignore and neglect the proceedings which he himself had instituted, for a period of four (4) years and then be entitled to the benefits of Subsection (S). We believe that one who institutes proceedings of this character owes a duty to himself and to the court to proceed with some degree of promptitude.

C. Notice of dismissal need not be given.

No notice of dismissal need be given to the debtor, for the debtor, by the filing of his original petition, invoked the jurisdiction of the Bankruptcy Court and placed himself and his property under its protecting mantle.

> "Bankruptcy proceedings are in rem and not in personam."
>
> *1 Remington,* 4th Ed. 47, Para. 21.
>
> "Thus all persons are bound thereby as to all proceedings that are strictly bankruptcy proceedings."
>
> *1 Remington,* 4th Ed. 50, Para. 22.
>
> "It is a distinguishing characteristic of judgments in rem that direct notice to the parties having inter-

ests in the subject matter of the litigation is not essential to their validity."

15 R.C.L. 633, Para. 76.

"Like other judgments in rem, an adjudication in bankruptcy is res adjudicata as to the facts or as to the subsidiary questions of law, as between those who were parties or privies to the proceedings."

Gratiot County State Bank v. D. Lloyd Johnson, Trustee, 249 U.S. 246, 63 L.Ed. 587, 39 Sup. Ct. Rep. 263.

This Court, in its opinion in *Kalb v. Feuerstein,* 308 U.S. 433, held that the mere filing of a petition under Section 75 ousted the state court of all jurisdiction *without notice,* and held that such a construction was consistent with the Constitutional guaranty of "due process".

That no notice of the filing of the original petition is necessary, is consistent with the theory that the proceedings being in rem, all the world is required to take notice of such filing and of all subsequent steps in the proceedings.

And certainly it must follow that if creditors and lien claimants are required to take notice of the various steps in the proceedings, such a rule must apply with equal force to the debtor. He instituted the proceedings, he sought the protective jurisdiction of the Bankruptcy Court. The burden of prosecuting the proceedings to completion is his. The debtor alone can invoke the benefits of Subsection (S).

We think the language of the court in *Massey v. Farmers & Merchants National Bank & Trust Company,* 94 F. 2d, 526, at page 530, is controlling on this question. The court said in part:

"The debtor charges that it was error on the part of the court to affirm the findings of the conciliation

commissioner and dismiss the petition in case No. 4292 without notice to her. It would no doubt have been proper practice upon the filing of the report to have notified the debtor to show cause on or before a certain date, if any she had, why the report should not be approved and the debtor's petition dismissed. But we cannot say that it was error to follow the course which the court pursued. *The filing of the report of the commissioner, of which the debtor was bound to take notice, took place on October 15, 1937, and it was shown therein that the debtor's petition had not been filed in good faith. Thereafter twenty-one days elapsed (during which interval the debtor took no exceptions to the report) before the report was accepted and the petition dismissed;* and in the meantime, the order restraining the bank from taking action upon its claims remained in effect. The court was therefore justified in putting an end to the proceeding in the absence of any controlling statute or rule of court to the contrary." (It is significant to note that a writ of certiorari to the Supreme Court of the United States in the above matter was dismissed. 58 S. Ct. 761, 303 U.S. 665, 82 L.Ed. 1122). (See, also, In Re Hunderson, 100 F. 2d 820). (Italics ours).

The petitioner has not been denied "due process" in this instance any more than an ordinary bankrupt who, through inadvertence or neglect, fails to make application for discharge, or a litigant in a court of law whose proceedings are dismissed for failure to prosecute.

Nor has he been denied "due process" any more than have the respondents whose proceedings in the state court were suspended without notice, and without any opportunity being afforded them to appear in opposition to the institution of the original proceedings, or the reinstatement of the petition once dismissed.

The petitioner here seems to have taken the position that, having once filed his petition, his duty to the court and to himself was ended, and that he could sit idly by to the prejudice of his creditors and use the process of the court as a means of delay.

An examination of the record best demonstrates the attitude of the petitioner toward the District Court and the proceedings therein.

Although his original petition was filed on October 2, 1934, and although he was unable to reach an agreement with his creditors, no order of dismissal was entered until June 27, 1935, at which time an order dismissing the petition was entered, based upon the commissioner's report which recited that, "There was no amended petition filed in this matter". (R. 8).

The proceedings were, as we contend, erroneously reinstated without notice to the respondents on September 6, 1935. (R. 10).

From that date until March 11, 1936, the petitioner failed to make any offer to creditors as a part of the proceedings before the commissioner and failed to file an amended petition as required by Subsection (S). (See report of conciliation commissioner at R. 10. Also, affidavit of conciliation commissioner at R. 12).

Counsel for the petitioner contends that during that period the petitioner was conducting private negotiations with his creditors. This, of course, was his privilege and one which he might well have exercised without instituting proceedings under Section 75.

We submit that under the admitted facts, the commissioner and the court could, and perforce were compelled to, arrive at only one conclusion—that the petitioner had abandoned his proceedings.

III. The Petitioner's Petition Was Properly Dismissed in View of His Failure to Make Timely Application for the Benefits of Subsection (S) of Section 75.

A. The contention of the petitioner that his proceedings were dismissed because he had been dispossessed cannot be established except by impeachment of the records of the District Court.

At Page 22 and Page 26 of the petitioner's brief, it is inferred that some concealed or unexplained reason existed for the dismissal of the petitioner's proceedings. The respondents submit that the record is clear, concise, and leaves no room for speculation. It should first be observed that the commissioner's report was dated March 11, 1936. At that time Kalb was still in possession of his farm.

Although the order of dismissal was not entered until March 17, 1936, after eviction had taken place, the statement that the real reason for dismissal was that the petitioner had been completely divested of his property (petitioner's brief, page 26) is a rash and entirely unwarranted conclusion.

The report is clear and concise, setting forth that no offer had been made to creditors, and that no amended petition had been filed. (R. 10). Upon that report and for those reasons the order of dismissal was entered. (R. 11).

Likewise, the statement that it would have been a vain proceeding to have applied to the district court for relief under Subsection (S) is entirely erroneous. As a matter of fact, the schedules filed by the petitioner in this

matter listed real and personal property other than that covered by the Feuerstein mortgage. The petitioner was entitled, if he desired, to have that property administered in the Bankruptcy Court.

Nor would there have been any duplication of litigation. As a matter of record, the proceedings in the state court were not instituted until September, 1937, nearly eighteen months after the petitioner's eviction and the dismissal of these proceedings. Those proceedings are still pending in the courts of Wisconsin, awaiting determination by the Circuit Court of Walworth County.

Precisely nothing has been decided in the state court proceedings as yet as to the occupancy of the farm, except that the filing of a petition under Section 75 is an ouster of jurisdiction of the state courts as to any proceedings therein pending affecting the petitioner or his property. The defenses of laches, estoppel, etc., are still available.

B. The failure of the petitioner to make and file a written offer to his creditors required the dismissal of the petition.

We advert at this point very briefly to the case of *Bartels v. John Hancock Mutual Life Insurance Company,* 84 L.Ed. 176, 308 U.S. 180.

In that case, this court held that where the debtor, after his proposed plan is rejected by his creditors, seasonably amends his petition and seeks to avail himself of the provisions of Subsection (S), he is entitled to proceed under that Subsection. And the fact that the plan offered was not feasible, or that no possibility of the financial rehabilitation of the debtor existed, is not grounds for dismissal of the proceedings.

But that case is of no value in the consideration of this matter, for in this case the petitioner failed to take the first step in the necessary procedure, even though he had nearly two years in which to do so.

That the Act requires the filing of a proposal to creditors is beyond question.

In the case of *In Re Vater,* 14 F. Supp. 631, at Page 632, the court said:

> "It seems to be clear and in harmony with the rulings of most of the courts which have considered the matter that before a farmer is entitled to amend his petition in order to avail himself of Subsection (S), it is necessary that he shall have made a proposal to his creditors for composition and extension under Subsections (A) to (R) * * * The theory of the law under which a good faith proposal is made a condition precedent to the relief provided by Subsection (S), presupposes a fair opportunity to creditors to weigh and consider the debtor's voluntary offer in comparison with the alternative remedy afforded such debtor under the provisions of Subsection (S)."

And in *In Re Ballard,* 10 F. Supp. 549, where an amended petition under Section 75 (S) was dismissed, the court said:

> "The petitioner apparently is laboring under a misapprehension of the law. The Bankruptcy Act, Section 75, requires the consent of only the creditors whose claims have been filed and allowed to the acceptance of a composition or extension. Only two creditors have filed claims. It does not appear that the petitioner is unable to obtain their consent.
>
> Moreover, it is clear that under the language of Section 75 (S), the farmer must either have actually proposed a plan which the creditors have not accepted or he must feel aggrieved by one they have accepted. The petition does not disclose such facts."

And in *In Re McMurray,* 8 F. Supp. 449, at page 453, the court said:

> "Whether a debtor can get his creditors to accept his proposal should, if possible, be decided at the first meeting, and, outside of exceptional cases, it should be done at this meeting or at least within an adjourned meeting of not less than ten days. *These proceedings contemplate a prompt offer of compromise or extension by the debtor to pay his debts. This must be undertaken expeditiously and proceeded with diligence.* The debtor should not be kept out of his property nor the creditor deprived of his rights to enforce his lien for any longer time than is necessary for a probable acceptance of the proposal of the debtor. When apparent that this cannot be promptly done, the proceedings should on motion be dismissed unless the debtor asks to be adjudged a bankrupt."

C. The benefits of Subsection (S) will be extended only to those debtors who make application therefor.

In the matter of *In Re Cresap,* 99 F. 2d 722, at Page 727, the Circuit Court of Appeals for the Seventh District, by Sparks, Circuit Judge, said:

> "It is quite true that amended Subsection (N), 11 U.S.C.A., Para. 203 (N), subjects the farmer and all his property, for the purposes of Section 75, to the exclusive jurisdiction of the court from the time the farmer's petition for composition and extension is filed. *A reasonable construction of that subsection would continue that jurisdiction for the purpose of permitting the debtor to ask for an adjudication if he failed in the composition, providing he asked for it within a reasonable time and before his reinstated petition for composition was rightfully dismissed.* Subsection (N) confers jurisdiction of the property for

the purposes of the Act. The two purposes of the Act are to extend to the farmer the unmolested right to effect a composition of his debts, and upon his failure in that respect it further extends to him, if he asks for it, the right to be ajudicated a bankrupt under Subsection (S) and to secure its benefits with respect to rehabilitation. *These rights were fully accorded to him, and the purposes of Subsection (N) were accomplished. He admittedly failed to effect a composition, and he failed to ask for the benefits of Subsection (S) until long after he had permitted his period of redemption to expire,* and after the expiration of repeated notices of the court to exercise his option to ask for an adjudication. Thereupon the court made the order complained of and for the several reasons hereinbefore discussed. We think there was no error.

The order of the District Court is affirmed." (Italics ours).

IV. The Dismissal of Petitioner's Proceedings by the District Court is Binding and Conclusive and the Doctrine of Res Adjudicata Applies.

It is the contention of counsel for the respondents that the petitioner, having filed his application for relief under Section 75, and having been given ample time in which to avail himself of its benefits, reinstatement of his petition was properly denied, in view of the fact that the proceedings were dismissed by the Federal Court for cause. We respectfully submit that the great weight of authority supports us in this contention.

In the case of *Wilcons v. Penn Mutual Life Insurance Company,* 104 F. 2d 456, at Page 458, the debtor filed his petition under Section 75 on the 13th day of January, 1936. The first meeting of the creditors was held

on the 25th day of February, 1936, and a report showing non-acceptance of the debtor's plan was filed on May 4, 1936. On May 29, 1936, the proceedings were dismissed.

On appeal, the Court held that where the plan of compromise is rejected, no time need be set in which to apply for confirmation, as provided by General Order No. 50 (4), as the setting of a time in which to apply for confirmation under those circumstances would be a mere gesture. The court refused to permit the debtor to file under Subsection (S), saying in part as follows:

> "Subsections (A) to (R) of the Act concern themselves with compositions and extensions. The debtor petitioned for relief under their terms. Where a debtor filed his petition under these provisions but is unable to secure acceptance of a proposed plan of composition or extension the proceedings has spent its force, it can accomplish nothing more and should be dismissed unless the debtor seasonably files a petition or an amendment to his original petition asking to be adjudged as a bankrupt under Subsection (S), as amended by the Act of August 28, 1935, 49 Stat. 942. That provision expressly authorizes the filing of such a petition in the event the debtor fails to obtain the acceptance of his proposed plan of composition or extension, as the case may be. It is silent in respect to the time within which such petition or amendment shall be filed. But General Order in Bankruptcy number 50 (4), 11 U.S.C.A. following Section 53, provides that if a farmer has not applied for confirmation within such reasonable time as has been fixed therefor, which shall be not later than three months after the date of the first meeting of creditors, unless the time has been extended in the manner provided, the commissioner shall report the facts to the court and the court shall thereupon dismiss the proceedings. In addition, Rule 41 of the

court below provides that a farmer who fails to obtain acceptance of a proposal for composition or extension may at any time within three months after the date of the first meeting of creditors, amend his petition or answer and ask to be adjudged a bankrupt. Here the debtor did not make application for confirmation within the time thus allowed. In the very nature of things, he could not do so because he failed to secure the requisite acceptance of such plan. The conciliation commissioner reported that the plan of extension was not accepted. The three months' period after the first meeting of creditors expired May 25, 1936. No other plan for extension had been proposed; no plan for composition had been offered; and no petition had been filed to be adjudged a bankrupt under Subsection (S). Indeed no petition for adjudication under Subsection (S) has ever been filed. The debtor has not yet sought in any manner to obtain benefits under that provision. He still asserts rights under Subsections (A) to (R). The fact that the insurance companies sought dismissal of the proceedings as to themselves and the lands involved did not absolve the debtor from the duty to secure acceptance of some proposed plan of composition or extension, or to petition within the authorized time to be adjudged a bankrupt under Subsection (S). He did neither. He thus suffered his proceeding under Subsections (A) to (R) to spend its force, and he failed seasonably to invoke Subsection (S). Manifestly he has not been wrongfully denied any right which the statute accords him."

In the case of *In Re Oyler,* 20 F. Supp. 595, at Page 597, the matter came before the court on the motion of a creditor for dismissal because of the failure of the debtor to make a bona fide offer of composition or extension of his debts. The motion was granted. We quote in extenso from the court's opinion, as we believe

that it is particularly applicable to the circumstances of the instant case:

> "Case comes up on motion of a creditor for dismissal because of the failure of the debtor to make a bona fide offer of composition or extension of his debts. Motion granted.
>
> The bank contends in its first ground for dismissal that this cause was never pending under Section 75 (S), 48 Stat. 1289, 11 U.S.C.A., para. 203 (s) and note. By the specific terms of Section 75, Subsection (S), a positive act is required on the part of the debtor to initiate proceedings under (S): 'Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt.'
>
> It is apparent that this cause could not be pending under that Subsection unless and until the debtor amended his petition asking to be adjudged a bankrupt. In the instant case the debtor exhausted his remedy under all prior subsections of Section 75 but took no steps to bring his case within the terms of (S). Without the required positive action on the part of the debtor, the court must conclude that this proceeding was never pending under former Subsection (S).
>
> It is further contended by the bank in its first ground that these proceedings were not dismissed because of the Supreme Court holding Subsection (S) to be unconstitutional. This issue must be determined from the record. As hereinbefore held, this cause was never pending under the subsection determined by the Supreme Court to be unconstitutional, and that fact has some bearing. However, any final doubt must be dissolved by the order itself, which held: ' * * * *and the Court being fully*

advised that the Commissioner is unable to reach a conciliation agreement of composition or extension does hereby dismiss said proceedings.'

This order of dismissal, acquiesced in by counsel for the debtor, leaves no room for doubt as to the ground of the dismissal; it was the failure to reach a conciliation agreement of composition or extension.

This being true, there was no valid ground for reinstatement of the case. Reinstatement is provided for in Section 75, Subsection (S) (5), 11 U.S.C.A., para. 203 (S) (5), reading in part as follows: 'This Act (title) shall be held to apply to all existing cases now pending in any Federal court, under this Act (title), as well as to future cases; and all cases that have been dismissed by a conciliation commissioner, referee, or court because of the Supreme Court decision holding the former Subsection (S) unconstitutional, shall be promptly reinstated, without any additional filing fee or charges.'

It is apparent from the record that this case was not so dismissed, neither can it be reinstated under the terms of the act upon that ground.

The second ground for dismissal urged by the bank is that no proceedings are now pending herein under Section 75, Subsection (S) of the amended act, 11 U.S.C.A., para. 203(s).

It is sufficient to say that no action has been taken by the debtor to amend his petition in order to bring himself within the provisions of that subsection, and for this reason this cause is not now pending under the subsection in question." (Italics ours)

It has also been held by the Circuit Court of Appeals for the Eighth District in *McWilliams v. Blackard,* 96 F. 2d 43, that even though the District Court erroneously held that Section 75 as amended was unconstitutional, in the absence of an appeal, the decision of the District

Court is binding on the debtor. In that case a petition was filed on the 26th day of October, 1935. No plan was accepted. On November 13, 1936, a dismissal was ordered on the ground that Subsection (S) was unconstitutional. No appeal from that ruling was taken. The court said, at Page 45:

> "The suggestion that the judgment of this court did not become final because the debtor made no application to the Supreme Court for certiorari is so obviously without merit as to require no discussion. Had the debtor procured a writ of certiorari from the Supreme Court of the United States, and had that court reversed the decision of this court, the judgment would not have become final. Since no action was taken by the debtor to secure a reversal of the decision of this court, the judgment, whether right or wrong, became final and binding upon him. This court had the same power to determine the controversy between these parties on the former appeal as it has to determine their present controversy.
>
> 'Whatever may be the nature of a question presented for judicial determination—whether depending on Federal, general, or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed.' Mitchell v. First Nat. Bank of Chicago, 180 U.S. 471, 481; 21 S. Ct. 418, 422; 45 L.Ed. 627.
>
> 'Whenever the right and the duty of a court to exercise its jurisdiction depends upon the decision of a question it has power to hear and determine, its judgment, right or wrong, is binding upon the parties and those in privity with them.' (Foltz v. St. Louis & San Francisco Ry. Co., 8 Cir., 60 F. 316, 319; Thompson v. Terminal Shares, 8 Cir., 89 F. 2d 652, 655; Wilcons v. Penn. Mutual Life Ins. Co., 10 Cir., 91 F. 2d 417, 419. 'The power to de-

cide includes the power to decide erroneously.' Simonitsch v. Bruce, 8 Cir., 258 F. 331, 333; Jack v. Hood, 10 Cir., 39 F. 2d 584, 595.

'The contention of the appellee that the decision of this court requiring the lower court to dismiss his petition was not a determination of the controversy presented by the former appeal upon the merits is clearly unsound. Whether a judgment is based upon the determination of a question of law or of a question of fact makes no difference with respect to its finality or effectiveness. It is a final judgment in either event.' Fauntleroy v. Lum, 210 U.S. 230, 237; 28 S. Ct. 641; 52 L.Ed. 1039; The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25; 33 S. Ct. 410; 57 L.Ed. 716.

We are now convinced that the court below had no power to reinstate the petition of the appellee upon the theory that the decision of this court was not res adjudicata."

In the case of *In Re Archibald,* 14 F. Supp. 437, at Page 439, the original proceedings were dismissed because of the failure of the debtors to effect a composition. The original petition was filed prior to the 19th day of January, 1935, and dismissed on the 18th day of June, 1935. On the 13th day of January, 1936, the farmer debtor filed a second petition for composition or extension under Section 75. The district court dismissed the second proceedings, saying in part as follows:

"It thus appears that the farmer-debtor, having in 1935 instituted and carried to final termination and adjudication of dismissal a proceeding for composition and extension under Section 75 (A to R), as amended, 11 U.S.C.A. para. 203 (A to R), has now commenced and is seeking to maintain a second proceeding under Section 75 for composition and extension against the same creditors involved in the first proceeding.

This is a judicial proceeding authorized by Section 75, by which a farmer-debtor may seek and obtain, if he can, an extension agreement or composition agreement with his creditors confirmed by the order and judgment of the court, thus making it valid and binding.

The subject matter involved in such a proceeding is the obtaining of a composition and extension of the farmer-debtor's debts.

If the debtor obtains an acceptance of his proposition for settlement by a majority in number and amount of his creditors, including his lien creditors, and that is confirmed by the order and judgment of the court, it is binding upon all of his creditors.

The proceeding may result in a failure to obtain a composition and extension and in that case there would be a judgment of dismissal entered.

The effect of filing such petition and application is to suspend, for the time being, the right of any creditor to enforce his claim.

If, upon the failure of a proceeding and judgment of dismissal, the farmer-debtor may commence a second proceeding against the same creditors and again suspend the enforcement of all claims against him, there is no reason why he could not, upon failure of the second proceedings, commence a third proceeding, and so on ad infinitum, and thus indefinitely prevent his creditors from enforcing their claims against him.

The act, so construed, would clearly render it obnoxious to the Fourth and Fifth Amendments to the Constitution of the United States, as depriving his creditors of their property without due process of law and without just compensation.

It cannot be assumed that Congress intended such a result. The farmer-debtor, by the first proceed-

ing, had his day in court and the controversy between him and his creditors was adjudicated. I think the doctrine of res adjudicata applies."

The case of *In Re Henderson,* 100 F. 2d 820, at Page 821, is, we think, squarely in point with the position taken by the petitioner in the instant case. While the order denying the petition for reinstatement was based upon the finding that no good-faith effort to effect a composition or extension had been made, the reasoning supporting the order is of importance here.

In that case, the debtor filed a petition praying to be allowed to effect a composition under the provisions of Section 75. At the first meeting of creditors, a plan was proposed. No acceptances were obtained, no order was entered fixing a time within which a plan might be presented, and the matter lay dormant for sixty-one days; whereupon, the conciliation commissioner certified the facts to the district court who ordered dismissal without notice to the debtor. Seventy-four days later, the debtor filed an amended petition for adjudication under Section 75(A), and upon learning that the original petition had been dismissed, asked that the order of dismissal be set aside and the case reinstated. The district court denied the petition and the Circuit Court of Appeals affirmed the district court, saying in part as follows:

"At the first meeting the plan or offer was rejected. No order was entered fixing the time within which a plan might be presented and the matter laid dormant for 61 days; conciliation commissioner reported facts and moved for dismissal.

Court dismissed petition without notice. Thereafter and within 74 days after the first meeting appellant filed his amended petition under (S) and on learning that the original petition had been dismissed, asked to have the order of dismissal set aside.

In denying the petition for reinstatement, the court found that no good-faith effort to effect a composition or extension had been made, and that appellant was not entitled to the relief provided for in Section 75(S) of the Bankruptcy Act. Baxter v. Savings Bank of Utica, 5 Cir., 92 F. 2d 404.

Appellant challenges the action of the court on the ground that, in the absence of an order limiting the time within which he could present a plan for confirmation, he had a maximum of ninety days, under Paragraph 4 of Section 50 of the General Orders, 11 U.S.C.A. following Section 53, and that, since this time had not elapsed, the order of dismissal was prematurely entered. It may be questioned whether or not the debtor can make this contention, since it is implied in the General Orders that such time as is *allowed by the court will be on his application, and the absence of such allowance results from an absence of a request therefor; and for the further reason that he is charged with notice of the various steps taken in the proceeding, which includes the reports of the conciliation commissioner and the supervision conciliation commissioner.* Cf. Massey v. Farmers & Merchants Nat. Bank & Trust Co., 4 Cir., 94 F. 2d 526.

In the present case, the finding of the court on the lack of good faith is not questioned, either in the briefs or in the record. *The application to the court below for reinstatement of the petition was not that appellant be allowed to make a good-faith offer, but that he be allowed additional delay for the filing of a petition for adjudication under Subsection (S). There is no apparent intention or desire to effect a conciliation or extension but it appears that appellant's one purpose is to hinder and delay his creditors.*

It has been pointed out that the relief afforded in Subsection (S) is not an end in itself, but is ancillary to and in aid of the rehabilitation of distressed farmers, as contemplated under the preceding sub-

sections of Section 75. The constitutionality of the section is grounded upon the principle that proceedings for the conciliation of creditors and the composition and extension of debts are within the scope of the bankruptcy provision of the Constitution, U.S.C.A. Const. Art. I, para. 8, cl. 4. Such a proceeding may not be converted into a sham for the purpose of gaining whatever the petitioner wishes by way of procedural delays and hindrances to creditors, where no legitimate purpose of the act will be served. Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 400, 462; 57 S. Ct. 556; 81 L.Ed. 736; 112 A.L.R. 1455." (Italics ours).

Even though it might be clear that the District Court had erred in the dismissal of the petitioner's petition, yet it was incumbent upon the petitioner to appeal from the order of dismissal within the time fixed by law.

The District Court had jurisdiction of the petitioner and his property. The dismissal of his petition was an order within the power of the court to make. It has often been stated, "That the power to decide includes the power to decide erroneously".

The sole remedy of the petitioner, if he believed the order of dismissal to be erroneous, was by appeal, not by a collateral attack upon the validity of the order.

This Court so stated in *Union Joint Stock Land Bank v. Byerly,* 310 U.S. 1, 60 S.C. 773, in which case the district court erroneously, and in clear violation of Section 75, permitted the sheriff to hold a foreclosure sale in a state court proceedings.

Mr. Justice Roberts said at page 693 of the opinion:

"In view of the provisions of Subsection (O), it was error for the District Court, in the absence of the preliminary steps required by that subsection, to permit the sheriff to hold the sale. *But the court*

had jurisdiction in the premises. Error committed by it in the exercise of that jurisdiction could have been corrected by appeal from its order. The State court and its officer, the sheriff, were entitled, in view of the District Court's plenary jurisdiction over the debtor and his property, to rely upon the order granting permission to make the sale. *The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable, but not void, and was not to be disregarded or attacked collaterally in the State court."* (Italics ours)

V. The Appeal from the Order of the District Court Was Not Taken Within the Time Prescribed by the Bankruptcy Act.

A. The time for appeal from the order of March 17, 1936, expired within 40 days after entry thereof.

Although the Circuit Court of Appeals did not base its decision upon the ground that an appeal did not lie because of the lapse of time, and only referred briefly to that phase of the matter (Opinion C.C.A. R. 44), we desire to call the subject to this Court's attention.

The petitioner's appeal was in part from the order of the District Court, dated March 17, 1936, dismissing the petition under Section 75. (Amended notice of appeal, R. 30).

We think it is quite obvious that the time within which an appeal might be taken from that order has long since expired.

Although in petitioner's "amended petition for reinstatement of petition", (R. 13, 17), it is alleged (R. 16,

para. 3) that the proceedings were dismissed without notice, there is no allegation in the record that the petitioner did not have actual notice of the entry of the order of dismissal.

But it is submitted by counsel for the respondents that no notice of the entry of an order in a bankruptcy matter need be served in order to start the time running within which an appeal may be taken. Section 25 (A), Bankruptcy Act, Title 11 U.S.C.A. 48 (A), provides:

> "Appeals under this title to the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service, or, if such notice be not served and filed, then within forty days from such entry."

The language contained in the quoted section cannot be misconstrued. If notice of entry of the order of judgment is given, the appeal must be taken within thirty days. If no notice is given, the appeal must be taken within forty days from the entry of the order. It follows, therefore, that the time within which an appeal might be taken from the order of March 17, 1936 has long since expired.

B. The appeal from the order of April 16, 1940, in effect seeks a review of the prior order and should be dismissed.

The respondents further contend that the appeal from the order of April 16, 1940, is, in effect, an appeal from the order of March 17, 1936, and for that reason, if for no other, should be dismissed. The petitioner moved the

District Court for a rehearing of the order of March 17, 1936, and for vacation of that order. His motion was denied and this appeal is taken from the order denying that motion.

The petitioner seeks to avoid the statute fixing the time within which an appeal may be taken, by moving the vacation of an order after the time for appeal has expired and then appealing from the order denying the motion to vacate.

It has frequently been held that such an appeal is subject to dismissal.

In *Mintz v. Lester,* 95 F. 2d 590, the District Court dismissed the proceedings under Section 75 of the Bankruptcy Act upon the motion of creditors on December 20, 1935. On April 21, 1937, the bankrupt filed a motion to reinstate the proceedings. On May 10, 1937, the trial court entered its order denying the motion to reinstate, from which order the bankrupt appealed.

The appellate court dismissed the appeal, saying at Page 591 of the opinion (last paragraph on that page):

> "Likewise the order of May 10, 1937, was not appealable. The petition to reinstate in effect sought a reconsideration of the court's action in dismissing the proceedings by its order of December 20, 1935, a rehearing of the motion to dismiss by a motion filed long after the time for appealing from such order had expired. A party may not avoid the effect of the statute limiting the time within which an appeal may be taken from an order, by filing after the time for appeal from such order has expired, a motion for rehearing or a motion to vacate the order denying the motion for rehearing or the motion to vacate."

The facts contained in the cited case are identical in practical effect with the facts in the case at bar.

Marcy v. Miller, 95 F. 2d 611, was a case that also arose under Section 75 of the Bankruptcy Act. In that case, the District Court entered an order on December 21, 1936, withdrawing certain lands from the proceedings. No appeal from that order was taken. On May 20, 1937, the bankrupt filed a motion to restore the jurisdiction of the District Court over those lands. The motion was denied and an appeal allowed by the District Court.

The appellate court held that the appeal should be dismissed, leave to appeal not having been obtained from the appellate court, and also, said on Page 612 (last paragraph of the opinion):

> "The appeal is footless for another reason. It is expressly taken from the order of May 27, 1937, overruling the motion to reinstate; but the errors assigned do not challenge that order. The assigned errors are directed to the order of December 21, 1936, withdrawing the lands covered by the mortgages from the proceedings. The time within which an appeal could be taken from that order had long since expired and it had become res adjudicata when this appeal was prayed and allowed. (An order made in a proceeding in bankruptcy may be reviewed only on appeal from it, not on appeal expressly taken from a subsequent order entered after the time allowed for appeal from the former order has expired)."

To the same effect is *In Re Irving-Austin Building Corporation,* 96 F. 2d 905, where the court said, at Page 906:

> "An order in a bankruptcy proceedings, from which appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. Nor may a party refrain from direct attack by motion to modify or by appeal from an order and later collaterally attack the same by an appeal from a later order, in which the court

overrules an objection attempting to raise a question disposed of by the previous order."

The respondents submit that the language of the cases cited is controlling, and that the decision of the Circuit Court of Appeals should be affirmed, if for no other reason.

CONCLUSION

It cannot reasonably be said that Congress intended the benefits of Section 75 to be forced upon a debtor unwilling to accept them, or that the Act could be employed as a shield behind which a debtor acting in bad faith could hide to the injury of his creditors, and in plain violation of the terms of the Act itself.

The petitioner instituted the proceedings under Section 75, but for some reason of his own, abandoned them and elected to try out the issues involved in the state courts. Having so elected, we contend he should be left to abide by the result of the state court actions.

To reinstate the petitioner's proceedings under Section 75, nearly four years after those proceedings were dismissed for cause, would be to reward a careless and negligent debtor who has used the process of the bankruptcy courts merely for the purpose of delay.

We respectfully submit that the decisions of the District Court and of the Circuit Court of Appeals were correct and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. ARTHUR MORAN,
Attorney for Respondents.

Office - Supreme Court, U. S.
FILED
APR 18 1941
CHARLES ELMORE CROPLEY
CLERK

(21)

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 816.

ERNEST NEWTON KALB, PETITIONER,

VS.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, RESPONDENTS.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

ELMER MCCLAIN,
Lima, Ohio,
WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

INDEX

Table of Contents

I. Reply to Argument I (A and B) in Respondents' Brief That "the District Court Had the Power to Issue a Restraining Order Pending This Appeal" and That the Bankruptcy Court Has Definite Power "to Grant Injunctional Relief" (pages 6 to 8 of Respondents' Brief) 1

II. Reply to Respondents' Argument II That the Dismissal of the Farmer Debtor Proceedings Did Not Deprive the Farmer Debtor of the Benefits of Section 75 (s) (pages 9 to 14 of Respondents' Brief) 3

A. (Pages 9 to 10 of respondents' brief) that "a debtor under Section 75 may amend his petition at any time" 4

B. (Pages 10 to 11 of respondents' brief) 5

C. (Pages 11 to 14 of respondents' brief) that "notice of dismissal need not be given" 6

Boyd vs. Glucklich 9

Galpin vs. Page 10

Gratiot vs. Johnson 10

In re Frank 9

In re Henderson 13

In re Rosser 8

Massey vs. Farmers 11

Remington on Bankruptcy 7

Ruling Case Law 10

III Reply to Respondents' Argument III That the Petition Was Properly Dismissed by the Bankruptcy Court Because the Farmer Debtor Did Not Make "Timely Application for the Benefits of Subsection (S)" (pages 15 to 19 of Respondents' Brief) 14

A. (Pages 15 to 16 of respondents' brief) 15

B. (Pages 16 to 18 of respondents' brief) 16

Comparison between the farmer debtor proceedings in John Hancock vs. Bartels, 308 U. S. 180, and in this Kalb case 17

The Bartels proposal 17

The Kalb proposals 19

In re Vater 20

In re Ballard 20

In re McMurray 21

In re Cresap 21

IV. Reply to Respondents' Argument IV that the Dismissal of the Farmer Debtor Proceedings Is Conclusive, Being Res Judicata (pages 15 to 30 of respondents' brief) 22

Wilcons vs. Penn 24

In re Oyler 25

McWilliams vs. Blackard 27

In re Archibald 28

In re Henderson 29

The Byerly Case 29

V. Reply to the Respondents' Argument V That (A) the Order of March 17, 1936, Is Not Now Appealable and (B) the Appeal from the Order of April 16, 1940, Seeks a Review of the Prior Order and Should Be Dismissed (pages 30 to 34 of the Respondents' Brief) 30

Discussion of the foregoing statement 32

Wayne vs. Owens-Illinois 32

Gypsy vs. Escoe 33

Supreme Court Advisory Committee 34

Morse vs. United States 35

Brockett vs. Brockett 35

Hughes on Federal Practice 35

In re Price 36

Carpenter vs. Condor 37

Bowman vs. Lopereno 37

Discussion of authorities cited in the respondents' fifth proposition 37
Mintz vs. Lester 38
Marcey vs. Miller 39
In re Irving Austin 39

Conclusion 39

Table of Cases

A

Adair vs. Bank, 303 U. S. 350 22
Archibald, In re, 14 Fed. Supp. 437 ..... 24, 28

B

Ballard, In re, 10 Fed. Supp. 549 20
Borchard vs. California Bank, 310 U. S. 311 ..... 15, 23, 29
Boswell vs. Otis, 50 U. S. (9 How.) 336 31
Bowman vs. Lopereno, ... U. S. ....., 61 S. Ct. 201 37
Boyd vs. Gluklich, 8 A. B. R. 393 ..... 8, 9
Brockett vs. Brockett, 43 U. S. (2 How.) 238 35

C

Carpenter vs. Condor, 108 F. 2d 318 37
Cresap, In re, 99 F. 2d 722, 727 21

F

First National Bank vs. Beach, 301 U. S. 435 22
Frank, In re, 25 A. B. R. 486 ..... 8, 9

G

Galpin vs. Page, 85 U. S. (18 Wall.) 350, 368 10
Gratiot vs. Johnson, etc., Trustee, 249 U. S. 246 ..... 6, 10
Gray vs. Union Joint Stock Land Bank, 308 U. S. 523 23
Gypsy vs. Escoe, 275 U. S. 498 ..... 33, 34

H

Henderson, In re, 100 F. 2d 820 ..... 13, 24, 29

I

Irving-Austin Building Corporation, In re, 96 F. 2d 905 39

J

John Hancock vs. Bartels, 308 U. S. 180 ..... 12, 13, 17-19, 20, 23, 29

K

Kalb vs. Feuerstein, 308 U. S. 433 ..... 2, 19, 23, 28, 32, 39, 40

Mc

McMurray, In re, 8 Fed. Supp. 449 21
McWilliams vs. Blackard, 86 F. 2d 328 27
McWilliams vs. Blackard, 96 F. 2d 43 27

M

Marcey vs. Miller, 95 F. 2d 611 39
Massey vs. Farmers, 94 F. 2d 526 ..... 6, 11, 12, 13, 29
Mintz vs. Lester, 95 F. 2d 590 38
Mitchell vs. St. Maxent, 71 U. S. (4 Wall.) 237 31
Monjon, In re, 113 F. 2d 535 16
Morrison vs. Federal Land Bank, 308 U. S. 524 23
Morse vs. U. S., 270 U. S. 151 35

O

Oyler, In re, 20 Fed. Supp. 595 ..... 24, 25

P

Price, In re, 99 F. 2d 691 36

R

Rosser, In re, 4 A. B. R. 153 8

S

Shriver vs. Lynn, 43 U. S. (2 How.) 43 31

T

Thatcher vs. Powell, 19 U. S. (6 Wheat.) 119 31

U

Union Joint Stock Land Bank vs. Byerly, 310 U. S. 1 ..... 24, 29, 36

V

Vater, In re, 14 Fed. Supp. 631 20

W

Wayne vs. Owens-Illinois, 300 U. S. 131 ..... 32, 34
Wilcons vs. Penn, 91 F. 2d 417 24
Wilcons vs. Penn, 104 F. 2d 456 ..... 23, 24
Wright vs. Union Central, 304 U. S. 502 ..... 23, 25, 29
Wright vs. Union Central, ... U. S. ....., 61 S. Ct. 196 23
Wright vs. Vinton, 300 U. S. 440 ..... 12, 13, 20, 22, 27

STATUTES AND RULES CITED

Bankruptcy Act of 1898 ..... 7, 38
Sections 18 and 19 7
Section 59 (g) 13, 14

Bankruptcy Act of 1938 38
Section 2, subsection 21 (b) (Section 2 (b)) 2, 3
Section 2 (a) 2, 3
Section 25 (a) 37

Section 75—

Subsections (a) to (r) 4, 19, 24, 25, 27, 28
Subsection (e) 4
Subsection (k) 21
Subsection (n) 22, 24, 25
Subsection (o) 24, 30
Subsection (q) 6
Subsection (r) 22
Subsection (s) 4, 5, 14, 15, 19, 21, 23, 24, 25, 26, 27

TEXT BOOKS AND AUTHORITIES CITED

Hughes, Federal Practice, Section 5437 35-36

1 Remington, 4th Edition, page 47, Paragraph 21 ..... 6, 7

1 Remington, 4th Edition, page 50, Paragraph 22 6
Remington, 5th Edition, Section 27 7
Remington, 5th Edition, Section 2406 7
Remington, 5th Edition, Section 2407 8
Remington, 5th Edition, Section 2408 8

15 Ruling Case Law, page 633, Paragraph 76 ..... 6, 10

Mitchell, "Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute" 34

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 816.

ERNEST NEWTON KALB, PETITIONER,

VS.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, RESPONDENTS.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENTS.

The order of this reply brief is that of the Respondents' brief to which it replies.

Emphasis in this reply brief is supplied unless otherwise noted.

I.

REPLY TO ARGUMENT I (A AND B) IN RESPONDENTS' BRIEF THAT "THE DISTRICT COURT HAD THE POWER TO ISSUE A RESTRAINING ORDER PENDING THIS APPEAL" AND THAT THE BANKRUPTCY COURT HAS DEFINITE POWER "TO GRANT INJUNCTIONAL RELIEF" (Pages 6 to 8 of Respondents' Brief).

This argument is that the bankruptcy court had inherent power to restrain the mortgagor from exercising dominion over his farm, thus "preserving the *status quo*."

In doing so the District Court interfered with a subject which was foreign to the issue before it. It interfered with the decision of this Court by authorizing the mortgagees to continue their trespass. The *"status quo"* is the unhampered right of the mortgagor to occupy and cultivate his farm free from interference by the mortgagees. The possession of the mortgagees was held by this Court to be illegal and void. *Kalb* v. *Feuerstein,* 308 U. S. 433. That decision is binding upon the district court. The application by the mortgagor to be restored to his rights under Section 75 could not deprive him of his right to occupy his farm as mortgagor. Such right was not in issue.

Had the farmer debtor been in possession (as he would have been but for the illegal acts of the respondents here) and sought reinstatement by the bankruptcy court of his farmer debtor proceedings, certainly the bankruptcy court could not have ordered the farmer debtor to surrender that possession because it denied reinstatement of proceedings. At the bottom of page 15 of the petitioner's brief herein the judge of the bankruptcy court expressly stated that no power existed for restraining the mortgagor from going on his farm (R. 25).

The statement at the top of page 7 of the respondents' brief that "Both [restraining] orders were entered pursuant to an oral stipulation between the parties" refers to the restraining order set forth at page 28, folio 36, of the Record. The record does not show such a stipulation and none existed. On the contrary the record at the end of that order reads: "The farmer debtor excepts to the above order" (R. 28).

"Section 2 (a)" and "Section 2, subsection 21 (b)" (no doubt referring to Section 2 (b)) of the Bankruptcy Act relied upon at pages 7 and 8 of the respondents' brief are not to be so construed as to authorize a court

of bankruptcy to revoke a final decision of the Supreme Court of the United States.

By omitting to quote Section 2 (a) in full, the portion quoted in respondents' brief is made to seem to mean what it does not say. What it says is that bankruptcy courts shall have such jurisdiction "as will enable them **to exercise original jurisdiction in proceedings under this act . . . to**—(1) adjudge bankruptcy; (2) allow claims; (3) appoint receivers, etc.; (4) punish for violations of the act; (5) authorize continuance of business; (6) bring in new parties; (7) collect estates; (8) close estates; (9) confirm or reject arrangements; (10) consider referees' orders; (11) determine exemptions; (12) issue discharges, etc.; (13) enforce lawful orders; (14) extradite bankrupts; (15) enforce the Act; (16) punish contempts before referees; (17) appoint trustees; (18) tax costs; (19) transfer cases; (20) exercise ancillary jurisdiction in bankruptcy cases pending elsewhere; (21) require receivers, etc., in other proceedings to account."

That is Section 2 (a) merely enumerates twenty-one kinds of bankruptcy powers. **No general power is granted.**

Nor does Section 2 (b) (quoted by respondents as "Section 2, subsection 21 (b)") grant any power to a bankruptcy court by which it may restrain a mortgagor from entering upon his property.

II.

REPLY TO RESPONDENTS' ARGUMENT II THAT THE DISMISSAL OF THE FARMER DEBTOR PROCEEDINGS DID NOT DEPRIVE THE FARMER DEBTOR OF THE BENEFITS OF SECTION 75 (s) (Pages 9 to 14 of Respondents' Brief).

The respondents assert that the petitioner was not deprived of any right by the dismissal of his proceedings without any notice that dismissal was sought or contemplated, without hearing and without notice that the order of dismissal had been entered.

A.

(Pages 9 to 10 of Respondents' Brief.)

That "A Debtor Under Section 75 May Amend His Petition at Any Time."

The respondents say that a farmer debtor "may amend his petition at any time." He may not do so except as prescribed by Section 75. If he could there might be two proceedings pending at the same time, one under Section 75 (a) to (r) for composition or extension and one under Section 75 (s) for the moratorium.

The law contemplates an effort for rehabilitation to be supervised by a conciliation commissioner whose office was especially created for that purpose. The court appointed the conciliation commissioner and referred the case to him for that purpose. The reference to the conciliation commissioner may be terminated only by his report and the order of the court which issued the order of reference. At any time before the conciliation commissioner makes final report to the court on the reference to him, the necessary number in amount and number of creditors may accept the proposal of the farmer debtor. Until such report there is no opportunity for the farmer debtor to invoke Section 75 (s) and "amend his petition or answer, asking to be adjudged a bankrupt" (quoted from the first sentence of Section 75 (s)). He may "amend his petition" only in the court where he filed it; he can not amend a petition which is before a conciliation commissioner for the conduct of proceedings which must be completed and reported to the court before there can be an amendment. In fact Section 75 (e) provides that the conciliation commissioner shall "after hearing the parties in interest fix a reasonable time within which application for confirmation shall be made, and may later extend such time for cause shown."

No such order was ever issued in this case. In fact negotiations between the petitioner and the respondents

continued right up to the time of the dismissal which occurred five days after the petitioner was evicted and the respondents were put in possession. And the conciliation commissioner knew of these pending negotiations. See the Amended Petition for Reinstatement in the record beginning at the first whole paragraph at page 15 and ending at the top of page 17. Also the Affidavit of the Respondent Feuerstein in the Record beginning at page 19, folio 24, and ending on page 20 at the beginning of folio 26.

The orderly procedure followed by the bankruptcy courts generally is that a notice and order to show cause is issued to the farmer debtor notifying him that the final report of the conciliation commissioner has been filed and ordering him to show cause why his proceeding should not be dismissed unless he files an amended petition by a specified time.

A farmer debtor may not exercise "his privilege to elect whether or not to become a bankrupt" (quoted from page 14 of the respondents' brief) until he has notice that he may exercise that privilege. It is a contradiction of thought and language to assert that one may "abandon" or "waive" that which he was not notified that he had.

B.

(Pages 10 to 11 of Respondents' Brief.)

It is urged that the dismissal did not deprive the petitioner of the benefits of Section 75 (s).

Contrary to the statement in the respondents' brief at the middle of page 10 of their brief that the record does not state that the proceedings were dismissed without notice, it is specifically so stated at page 16 of the record in the first full paragraph in folio 20. The docket of the bankruptcy court at page 3 of the record in the two entries of March 17, 1936, one noting the final report of the conciliation commissioner, and the other noting the order of dismissal **(on the same day)** clearly show no notice was given. Likewise the Report of the conciliation

commissioner at page 11 of the record in the "Fifth" paragraph shows no notice.

Whereas the statute contemplates that the bankruptcy court shall conserve and protect the rights of the farmer debtor and specifically provides in Section 75 (q) that a farmer debtor need not have counsel "in any proceeding under this section" and requires the conciliation commissioner to assist him, we find no evidence in this case that the spirit and requirement of the statute were observed. On the contrary we see two final reports (R. 6 and R. 10) and two dismissals without notice (R. 9 and R. 11), and the record contains at the foot of page 16 of the Record the statement of the petitioner that the conciliation commissioner "rendered no assistance of any kind."

C.

(Pages 11 to 14 of Respondents' Brief.)

That "Notice of Dismissal Need Not Be Given."

It is further asserted that notice need not be given to the farmer debtor of the dismissal of his petition. This is indeed a novel proposition devoid of support by any authority.

We will here proceed to examine the five citations to support this assertion which are found on pages 11 and 12 of the respondents' brief, namely:

(1) 1 Remington, Fourth Edition, page 47, Paragraph 21.

(2) 1 Remington, Fourth Edition, page 50, Paragraph 22.

(3) 15 Ruling Case Law, page 633, Paragraph 76.

(4) *Gratiot, etc.*, v. *Johnson, Trustee*, 249 U. S. 246.

(5) *Massey* v. *Farmers, etc.*, 94 F. 2d 526.

These citations which harmonize with well recognized principles of law mean that **once a judgment** *in rem* **is by due process of law properly rendered it is** *res judi-*

cata **as to itself—not as to all persons for all things.** For example: Adjudication in bankruptcy is *res judicata* and is effective as such to all the world. But it does not mean that a man may be adjudicated bankrupt without notice to him. Elaborate provisions were contained in Sections 18 and 19 of the Bankruptcy Act of 1898, and are now contained in the same sections of the present Act of 1938, for notice as in a suit in equity, for pleadings and for trial by jury. Nor does it even mean that adjudication in voluntary bankruptcy without notice is a final determination. If after such adjudication it appear, upon motion to dismiss after notice and hearing, that the jurisdictional allegations in the petition are untrue, the adjudication may be vacated and the case dismissed.

Remington on Bankruptcy.

(1) and (2) The quotations from Remington are only a part of what that author says on the subject. At the end of the section 21 from which the respondents quote he says: "Indeed they are both proceedings *in rem* and in some phases **also proceedings in personam.**" At Section 25 he says: "The bankruptcy act is remedial and should be interpreted reasonably and according to the fair import of its terms, with a view to affecting its objects and to promote justice." And in Section 27 he says in relation to Celerity of Proceedings: "While proceedings in bankruptcy may be summary, they should not be so summary as to deprive a party of **those fundamental rights that belong to every citizen, among which are the rights to be advised by the demand made upon him, and after being so advised to have a reasonable time to prepare his defense and produce his witnesses.**"

Likewise in his Chapter XXXVI on Summary Jurisdiction over the Bankrupt, Remington says in Section 2406. **"Reasonable notice must be served on the bankrupt** or other party upon whom the order is requested so that he may have reasonable time to prepare for his

defense." In Section 2407 he says: **"The ordinary notice is that of an order to show cause."** And in 2408: **"Due hearing must be had, and reasonable opportunity therefor is requisite."**

In support of the foregoing statements Remington quotes at length from three opinions: *In re Rosser,* 4 A. B. R. 153 (1900); *Boyd* v. *Glucklich,* 8 A. B. R. 393 (1902), and *In re Frank,* 25 A. B. R. 486 (1910).

In re Rosser.

The first case cited and quoted by Remington is *In re Rosser,* 4 A. B. R. 153 (1900), which involved an order upon a bankrupt to turn over $2,500 to the trustee. This order was issued after the examination of the bankrupt at the first creditors' meeting. The bankrupt being committed to jail for failure to obey the order, objected that he had not been notified that the turnover order was to be a subject of consideration at the creditors' meeting. In its decision the Circuit Court of Appeals for the Eighth Circuit said:

> "He was cited to appear and be examined under Section 21 of the Bankrupt Act and his testimony and that of various other witnesses were taken before the referee upon that citation, but no notice was served upon him that the claim, which culminated in the order for the payment of the $2,500, was made or was in issue at that examination, or that the testimony there elicited was taken for the purpose of establishing that claim, and no opportunity was presented to him to produce witnesses in his defense or to be heard upon the issues of fact or of law which the issue of the order involved. Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the questions of law which it involves. **It considers without notice, condemns**

without hearing, and renders judgment without trial. The order of the referee **was** unlawful and **void.**"

Boyd v. Glucklich.

The second opinion which Remington quotes is *Boyd* v. *Glucklich,* 8 A. B. R. 393 (1902). That opinion said:

> "It will be observed that the application of the trustee was not for an order of the bankrupt to show cause, upon reasonable notice, why he should not be required to turn over to the trustee the money and property mentioned in the application, but was for an immediate and unconditional order to be then made, based on the general and desultory examination of the bankrupt which had just been concluded."
>
> . . . . . .
>
> "Dispatch in judicial proceedings is commendable, but, in proceedings involving the liberty of **a citizen,** he **has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs,** and, lastly, **to be heard by counsel on the law and facts of the case.** While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. **The Bankrupt Act does not do away with these rights,** and **no citizen forfeits them by being adjudged a bankrupt.**"

In re Frank.

The third opinion quoted by Remington is that of *In re Frank,* 25 A. B. R. 486 (1910), where the bankrupt was given **two days notice** of a hearing which resulted in an order upon him. The Circuit Court of Appeals held that **the order was void** for want of adequate notice.

Galpin v. Page.

These authorities relied upon the decision of this Court in *Galpin* v. *Page*, 85 U. S. (18 Wall.) 350, 368, where it said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Ruling Case Law.

(3) The quotation from 15 Ruling Case Law 633, Section 76, at pages 11 and 12 of respondents' brief, is ripped from its setting. By "direct notice" the context shows that constructive notice by publication in a newspaper will bind the interest of a non-resident in real or personal property which has come into the jurisdiction of the court where such property is situated.

Gratiot v. Johnson.

(4) The case of *Gratiot, etc.*, v. *Johnson, Trustee*, 249 U. S. 246, cited as the fourth authority at page 12 of respondents' brief, illustrates the principle that a proceeding *in rem* does not deprive any person of the right to his day in court. After due pleadings and hearings there was an adjudication in involuntary bankruptcy upon the ground of preference during insolvency. The bank so found to have been preferred was sued by the Trustee in a state court to recover the preferential payments so received. The state courts held (as argued by the respondents in this Kalb case) that the adjudication was *res judicata* and rendered judgment against the bank for the amount of the preferred payments. Upon certiorari this Court held that **the adjudication** was *res judicata*

against the bank as to bankruptcy upon the ground that it received a preference.

But, although the bank had due notice of the petition in bankruptcy and of the charge that it received a preference, this Court said at page 252: "The allegation in the involuntary petition that the bank was among those who had received preference did not impose upon it the duty to appear to answer; and since it did not do so even a finding to that effect by the bankruptcy court would not have bound it." Here we have the preferred payment which was adjudged to be *res judicata* as to bankruptcy being held not to be conclusive against the payee. **Due process of law was assured to the bank by preserving the right to its day in court.**

Massey v. Farmers.

(5) Concerning the respondents' fifth authority, they say about it at page 12 of their brief:

> **"We think the language of the court** in *Massey* v. *Farmers & Merchants National Bank & Trust Company,* 94 F. 2d 526, at page 530, **is controlling on this question."**

Although the respondents say this decision in *Massey* v. *Farmers* is "controlling on this question" of whether the District Court rightly dismissed Mr. Kalb's case, that decision was based upon quite another point of law and the court was careful not to rest its decision upon due process. In five different ways the opinion so indicated. (1) Said the Court: "It would no doubt have been proper practice upon the filing of the report [of the conciliation commissioner] to have notified the debtor to show cause . . . why the report should not be approved and the debtor's petition dismissed." (2) Further, the decision continued, it could not be said that such dismissal was error because it was shown in the conciliation commissioner's report "that the debtor's petition had not been filed in good faith." (3) Also that, "In the

meantime the order restraining the bank . . . remained in effect." (4) In a later portion of the opinion (not quoted by the respondents) the court said, "Moreover, it can not be said that the debtor had no opportunity to present her views before the case was finally disposed of . . . **Counsel had an opportunity to be heard and an opinion was filed** . . . in which the facts were discussed on their merits and the absence of good faith was noted that was essential to the maintenance of the original as of the amended petition. **The debtor was not denied an opportunity for a fair hearing.**" (5) The court then cited and quoted from Note 6 in *Wright* v. *Vinton*, 300 U. S. 440, at 462, as authority for dismissing the proceeding for "lack of good faith."

It is clear that the court considered lack of notice of dismissal to be a moot issue because, as it said, (a) the debtor "was not denied an opportunity for a fair hearing," (b) the restraining order had been maintained against the bank and, (c) chiefly, because this Court in Note 6 in *Wright* v. *Vinton* had held that a farmer debtor petition not filed in good faith was subject to dismissal. In support of its power to dismiss for lack of good faith the opinion cited six other decisions holding that farmer debtor proceedings were subject to dismissal for lack of good faith. The whole force and effect of *Massey* v. *Farmers* was grounded upon Note 6 which was repudiated in *John Hancock* v. *Bartels*, 308 U. S. 180, at 184, in Note 3, where this Court said: "What is said upon this point in Note 6 in *Wright* v. *Vinton Branch*, 300 U. S. 440, 462, was not essential to the opinion in that case and is not supported by the terms of the statute."

The respondents make a point of the fact that in the Massey case a "Writ of certiorari to the Supreme Court of the United States was dismissed." The whole truth is that certiorari was "Dismissed on motion of counsel for petitioners" (Quoted from 303 U. S. 665).

In re Henderson.

The respondents then cite *In re Henderson,* 100 F. 2d 820 (C. C. A. 5), as supporting *Massey* v. *Farmers.* But it is equally devoid of weight. The Henderson decision by two judges, Judge Hutcheson dissenting, doubtfully questioned whether the farmer debtor could complain of dismissal of his proceeding without notice, and cited the *Massey* v. *Farmers* decision. The second headnote of the report of the case in 38 A. B. R. (N. S.) 213 reads: "And it is doubtful whether he can assert that his petition was prematurely dismissed, even though he was given no notice of the proposed dismissal." Like *Massey* v. *Farmers,* the Henderson decision considered the issue of dismissal without notice to be a moot question. **It was based squarely upon lack of good faith** and cited Note 6 in *Wright* v. *Vinton, Massey* v. *Farmers,* and six other decisions, all of which were overruled by *John Hancock* v. *Bartels,* 308 U. S. 180. In his dissenting opinion Judge Hutcheson declared the courts have no power to dismiss farmer debtor proceedings and his dissent was approved by this Court in *John Hancock* v. *Bartels* which overruled *In re Henderson, Massey* v. *Farmers,* and all like decisions.

We believe it has been demonstrated that neither *Massey* v. *Farmers* nor *In re Henderson* lends any support to the assertion that the District Court could properly dismiss Mr. Kalb's case without notice and without hearing.

None of the five authorities which are cited by the respondents supports their argument that bankruptcy proceedings may be dismissed without notice. On the contrary such dismissal is specifically prohibited by statute. Section 59 (g) of the Bankruptcy Act of 1898 (which was in force when Mr. Kalb's petition was dismissed) reads as follows:

> **"A voluntary** or involuntary **petition shall not be dismissed** by the petitioner or petitioners or **for want**

> **of prosecution** or by consent of parties **until after notice** to the creditors **and** to that end **the court shall, before entertaining an application for dismissal,** require the bankrupt to file a list, under oath, of all of his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall **delay the hearing thereon for a reasonable time to allow all** creditors and **parties in interest opportunity to be heard."**

Section 59 (g) of the present Bankruptcy Act of 1938 contains more detailed and stringent provisions relating to dismissal.

But say the respondents at the bottom of page 13 of their brief, the petitioner was no more denied due process than any bankrupt whose case is dismissed for failure to apply for discharge. The Bankruptcy Act of 1898 in Section 14 **specifically** made it the duty of the bankrupt to file his application for discharge.

The other contentions of the respondents in their Argument II have been fully discussed in the petitioner's brief at page 31 beginning at paragraph 3; also at page 23 ("The Farmer Debtor Complied with the Farmer Debtor Law and Obeyed the Order of the Bankruptcy Court"). Also at page 30 of the petitioner's brief in the discussion of the opinion of the judge of the bankruptcy court, under paragraph numbered 1; and at the bottom of page 24 of the petitioner's brief, beginning with the words "Certainly no default."

III.

REPLY TO RESPONDENTS' ARGUMENT III THAT THE PETITION WAS PROPERLY DISMISSED BY THE BANKRUPTCY COURT BECAUSE THE FARMER DEBTOR DID NOT MAKE "TIMELY APPLICATION FOR THE BENEFITS OF SUBSECTION (S)" (Pages 15 to 19 of Respondents' Brief).

Here the respondents suggest that the case was properly dismissed because of the petitioner's failure to make "timely application" under Section 75 (s).

The petitioner on September 6, 1935 (which was nine days after the enactment of the present Section 75 (s) on August 28, 1935), prayed "that the said petition heretofore filed by him . . . be reinstated and he be given relief in accordance with Section 75 thereof as amended" and his application specifically referred to the new Section 75 (s) (R. 9 and 10). It may be noted with reference to this application that in the Borchard case (*Borchard* v. *California Bank*, 310 U. S. 311, 314) that a like "petition for reinstatement" was employed to reinstate a dismissed farmer debtor proceeding.

Without discussing their proposition III as a whole the respondents' brief divides it into three parts, A, B, and C, which are accordingly separately discussed here.

A.

(Pages 15 to 16 of Respondents' Brief.)

The respondents say that to assert that the farmer debtor case was dismissed by the bankruptcy court because of his eviction from his farm is to impeach the record. The record is silent upon that subject and the suggestion offered in the petitioner's brief is not inconsistent with, or contradictory to, the record. The respondents concede at page 15 of their brief that the district court's opinion at the end of the second paragraph at record page 25 incorrectly stated that the conciliation commissioner's report was made before the unlawful eviction by the state court (See the second paragraph after the heading on page 15 of the respondents' brief). And yet in that paragraph the respondents say: "It should first be observed that the conciliation commissioner's report was **dated March 11, 1936.** At that time Kalb was still in possession of his farm." The **date** of the report is immaterial. The fact that he dated it one day prior to the eviction and filed it on March 17, five days after the eviction, is **strong evidence that he knew that eviction**

was imminent. He no doubt also knew that the State Court had issued a writ of assistance many weeks before. He merely waited until after the eviction to file his report (R. 10 and 11).

A comparable situation was presented to the appellate court below in *In re Monjon,* (C. C. A. 7) 113 F. 2d 535. That court said:

> "However it is noted that **the authorization to continue foreclosure closely followed the decision of the Supreme Court in the case of Louisville Joint Stock Land Bank v. Radford,** 295 U. S. 555, wherein that Court declared the Frazier-Lemke Act, as it then stood, unconstitutional. **Also, the debtor's petition to dismiss followed rather closely upon the ruling of this court in Re Lowmon,** 79 F. 2d 887, wherein this court held the amended Frazier-Lemke Act unconstitutional as applied to facts very similar to those involved in the proceeding then in progress."

B.

(Pages 16 to 18 of Respondents' Brief.)

Assuming that the farmer debtor failed to file a written offer the respondents claim that dismissal of his farmer debtor petition was thereby **required.** If so he was entitled to notice and a hearing. This is especially true because the commissioner himself reported that **"due effort was made to effect a composition or extension"** and that "such efforts failed because of the refusal of the principal secured creditor [the respondents here] to accept **debtor's proposal,** or to enter into negotiations for adjustment" (Record page 8, First Report of Conciliation Commissioner, seventh paragraph. Record page 16, Amended Petition for Reinstatement, Folio 20). In his second Report, nine months later (R. 10 and 11, Folio 12), the conciliation commissioner, after stating that the farmer debtor appeared at three called creditors' meetings but no creditor appeared, reported that the farmer debtor

"failed to make any offer to creditors and failed to file an amended petition and therefore this conciliation commissioner recommends that this petition be dismissed."

The statute does not require a written proposal. There was none in the Bartels case. We will examine the Bartels offer.

Comparison Between the Farmer Debtor Proceedings in John Hancock v. Bartels, 308 U. S. 180, and in This Kalb Case.

The Bartels Proposal.

There was no written proposal in the Bartels case. The following is quoted from the conciliation commissioner's report at page 3 of the record filed in the Bartels case. After reciting the date of the creditors' meeting (December 21, 1937) and naming those present the commissioner's report continues:

> "A detailed examination was made of the debtor's financial condition and after discussions the said debtor proposed to sell personal property valued at approximately $250 and also sell a lot which he owns situated in San Antonio, Texas, and apply the proceeds thereof to liquidate part of the delinquencies to the John Hancock Mutual Life Insurance Company. At the same time the debtor proposed to fully pay all delinquencies remaining unpaid to said John Hancock Mutual Life Insurance Company within three (3) years, but the said Insurance Company declined to accept such proposition. The debtor made an agreement with Mrs. Kraft and Mrs. Sauer for an extension of their debts but was unable to obtain an agreement with a majority of the creditors in number and amount."

The stenographic report of the creditors' meeting in the Bartels case occupies pages 15 to 67 of the record. It shows conclusively that the proposal was verbal, not written.

Page 56 of the Bartels record contains the following:

> "The Commissioner: Mr. Bartels, the only way that I can see that you can in any way get by is to apply the money that you get from your store, and to sell those lots that you have up in San Antonio even if you don't get $500 for them, and turn that money over to Martindale Mortgage Company and then probably make some kind of a proposition and get them to give you more time on the rest. It looks like you are going to have to do that before you—
>
> Mr. Bartels: I am willing to do it; sure, I am willing to do everything I can.
>
> The Commissioner: Well, now if you turn in the money that you get from the sale of your store, and turn in those lots in San Antonio, say, for instance, those lots would be worth $400 and your interest in the store $200, that is $600. If he applied that on this debt do you think that you could work out some method by which you could extend the rest of this debt?
>
> Mr. Leslie: I don't think so. . . ."

From page 65:

> "The Commissioner: . . .
>
> Now, as I understand it, that is all the proposal, that is all you can do, that is the only suggestion you have to make, Mr. Bartels?
>
> Mr. Bartels: Yes, sir."

At page 182 of the Bartels opinion, the creditors' meeting and the offer are summed up as follows:

> "A meeting of the creditors was held on December 21, 1937, at which the debtor was present and was examined. It appeared that his debts amounted to about $10,000 of which about $8,000 (including interest and attorney's fees) was owing to the John Hancock Mutual Life Insurance Company and was secured by a lien upon his home. As the debtor was unable to obtain an agreement with a majority of his creditors in number and amount, he notified the commissioner that he would apply to be adjudged a bankrupt under subsection (s) of Section 75."

In the respondents' brief in this pending Kalb petition for certiorari it is assumed that the Bartels case differs from the Kalb case in that Mr. Bartels filed an amended petition under Section 75 (s) whereas Mr. Kalb did not. It is true that Mr. Bartels filed an amended petition and was adjudicated a farmer debtor bankrupt. But on motion of the secured creditor the adjudication was vacated and the amended petition was dismissed. The court then dismissed the whole proceeding. This placed the Bartels case in exactly the same situation as the present Kalb case, that is, with proceedings under Section 75 (a) to (r) completed and his case dismissed. This Court said: "The farmer debtor may offer to pay what he can, as Bartels did, and he is not to be charged with bad faith in taking the course for which the statute expressly provides." 308 U. S. 180, at the top of page 185.

The Kalb Proposals.

The conciliation commissioner's Report in this Kalb case discloses proceedings parallel to those in the Bartels case. At record page 6, folio 8, in this case the conciliation commissioner's report at the top of record page 8 reads:

> "Seventh. That at said meeting the debtor was examined by the conciliation commissioner and by his creditors; that **due effort was made to effect a composition or extension of time for the payment of debts;** that **such efforts failed because of the refusal of the principal secured creditor** [the respondents here] **to accept debtor's proposal, or to enter into negotiations** for adjustment."

In the second conciliation commissioner's Report at record page 10, folio 12, at the top of page 11 he reports that at three creditors' meetings the farmer debtor appeared each time; that no creditor appeared; and that the farmer debtor made no offer and filed no amended petition. Upon this basis the conciliation commissioner recommended dismissal.

We think the Kalb case presents a more favorable situation for the farmer debtor than did the Bartels case and points to the same conclusion.

We will here discuss the three cases relied upon by the respondents in support of their contention that Section 75 requires a written offer.

1. In re Vater, 14 Fed. Supp. 631.

(Cited and partially quoted at page 17 of Respondents' Brief.)

The full report of the decision shows that the farmer debtor made a proposal of which the District Court did not approve. Following certain Samuelson, Hilliker, Borgelt and Richert decisions, the court dismissed the whole case. This Court in *John Hancock* v. *Bartels*, reversed all of these decisions, including *In re Vater*. Note 6 in *Wright* v. *Vinton*, 300 U. S. 440, at page 463, expressly cited this Vater decision in its support. Note 6 was repudiated by this Court in Note 3 of its later decision in *John Hancock* v. *Bartels*, 308 U. S. 180, at 184, and thereby the Vater case was definitely overruled. The Vater decision held that the farmer debtor must make an **offer.** We agree. The quotation submitted by respondents fails to support the thesis that the offer must be written.

2. In re Ballard, 10 Fed. Supp. 549.

(Cited and quoted at page 17 of Respondents' Brief.)

In this case only two creditors filed claims and the farmer debtor, believing he could not obtain a majority of all when but two filed claims, filed his amended petition. The District Court declined **"without prejudice"** to accept it. The court explained that only those creditors who filed proofs of claim could vote and those who did not file were not to be counted in determining a majority in number and amount of claims. The farmer debtor was left free to seek the consents of the two creditors who filed claims before filing an amended petition. **The case**

was not dismissed. The decision holds that an offer must be made, not that it must be in writing.

3. In re McMurray, 8 Fed. Supp. 449, 453.

(Cited and quoted at page 18 of the Respondents' Brief.)

It suffices to quote from the concluding sentence of the opinion in the McMurray case: "It appearing that **the debtor is not a farmer** within the meaning of the Act, the cause and proceedings herein are dismissed, . . ." That was the end of the matter because the court had no jurisdiction of the person or of the subject matter. The court further held that the proposal was defective under original Section 75 (k) because it impaired a lien. That provision has been repealed. The present Section 75 (k) permits such impairment. As in the two other quotations offered by respondents, this decision does not require a written offer.

The three decisions put forth by the respondents hold that a farmer debtor is required to make diligent effort to obtain composition or extension from his creditors. The conciliation commissioner's report in the Record at the top of page 8 shows that he made "due effort" and that the respondents caused it to be rejected.

In re Cresap.

(Pages 18 and 19 of Respondents' Brief.)

The respondents cite and quote *In re Cresap*, 99 F. 2d 722, 727, to prove that "The benefits of subsection (s) will be extended only to those debtors who make application therefor." Agreed.

The petitioner Kalb in this case made such application in his "Petition for Reinstatement" (R. 9). He cited the amendment of Section 75 by the present Section 75 (s) and prayed that "he be given relief in accordance with Section 75 thereof as amended." He had no control over either the conciliation commissioner or the bankruptcy court as to how his proceedings were to be

administered. He diligently obeyed every order of either court or conciliation commissioner, as has been shown beginning at page 23 of the petitioner's brief.

The first holding in the Cresap decision was: "It is clear from this evidence that **the debtor . . . was not a farmer** within . . . subsection (r)." He had not for sixteen years "lived on a farm, or operated one, or realized any substantial part of his income from farming operations." He worked in railroad shops. That disposed of the case. We see no fault in the further observations as quoted in the appellees' brief, especially that portion which states that "A reasonable construction of that subsection [n] would continue that jurisdiction for the purpose of permitting the debtor to ask for an adjudication if he failed in the composition providing he asked for it within a reasonable time and before his reinstated petition for composition was rightfully dismissed."

IV.

REPLY TO RESPONDENTS' ARGUMENT IV THAT THE DISMISSAL OF THE FARMER DEBTOR PROCEEDINGS IS CONCLUSIVE, BEING RES JUDICATA (Pages 15 to 30 of Respondents' Brief).

In their Proposition IV the respondents suggest that this court is bound by the doctrine of *res judicata* to accept as final the dismissal without notice or hearing and thus leave the petitioner without the benefits of Section 75 (s).

It is suggested that ten unanimous decisions of this Court in considering every flaw suggested by objecting creditors has left no doubt that Section 75 is to be administered in full sympathy with its purpose and not in the spirit of seeking ways to evade it. These ten decisions are:

1. *Wright* v. *Vinton,* 300 U. S. 440.
2. *First National Bank* v. *Beach,* 301 U. S. 435.
3. *Adair* v. *Bank,* 303 U. S. 350.

4. *Wright* v. *Union Central,* 304 U. S. 502.

5. *John Hancock* v. *Bartels,* 308 U. S. 180.

6. *Gray* v. *Union Joint Stock Land Bank,* 308 U. S. 523.

7. *Morrison* v. *Federal Land Bank of Louisville,* 308 U. S. 524.

8. *Kalb* v. *Feuerstein,* 308 U. S. 433.

9. *Borchard* v. *California Bank,* 310 U. S. 311.

10. *Wright* v. *Union Central,* ..... U. S. ....., 61 S. Ct. 196.

All captious suggestions aimed at clipping away here and there the effectiveness of Section 75 have been disapproved. This Court has repeatedly indicated that every farmer debtor who invokes Section 75 is to have the benefit of all its provisions. Most of the courts are now wholeheartedly following the interpretations of this Court. However in 1935 when this Kalb proceeding was dismissed there was much disagreement with the spirit and purpose of the law.

We do not understand how a dismissal of a case without notice and without hearing can be *res judicata* so as to deprive the farmer debtor of his statutory right to the benefits of Section 75 (s). Especially when, as here, the dismissal occurred on the same day that the conciliation commissioner, without notice or hearing, filed his recommendation of dismissal. We think there is a "higher law" which says there can be no wrong without its remedy. Courts of equity do not embrace suggestions aimed to deny the remedy. They seek to preserve it.

To sustain their suggestion that there is no remedy against the dismissal without notice or hearing the respondents rely upon six decisions. They are:

1. *Wilcons* v. *Penn,* 104 F. 2d 456 (C. C. A. 10) (1939).

2. *In re Oyler*, 20 Fed. Supp. 595 (District Court, Ohio) (1936).

3. *McWilliams* v. *Blackard*, 96 F. 2d 43 (C. C. A. 8) (1938).

4. *In re Archibald*, 14 Fed. Supp. 437 (District Court, Minnesota) (1936).

5. *In re Henderson*, 100 F. 2d 820 (C. C. A. 5) (1938).

6. *Union Joint Stock Land Bank* v. *Byerly*, 310 U. S. 1 (1940).

Each of these decisions is readily distinguished. We discuss them here.

Wilcons v. Penn.

1. *Wilcons* v. *Penn*, 104 F. 2d 456 (C. C. A. 10) (1939), is cited at page 19 of the respondents' brief. There were two appeals, the first (*Wilcons* v. *Penn*, 91 F. 2d 417 (1937)) held that motions to dismiss should have been controlled by Section 75 (o). Pending the appeal in the first case the mortgage holders took deeds in foreclosure just after the state statutory period of redemption normally would have expired. On the second appeal which is the case cited by the appellees (*Wilcons* v. *Penn*, 104 F. 2d 456 (1939)) it was held that the delivery of the deed pending the first appeal divested the farmer debtor of all title because he had not filed an amended petition under Section 75 (s).

This second Wilcons decision was based uopn the theory that after the conciliation commissioner filed his final report of proceedings for composition or extension the bankruptcy court's jurisdiction was ended and the state court's jurisdiction was revived. The decision disregarded two provisions of the statute, namely, Section 75 (n) (as amended August 28, 1935) providing that "The filing of a petition . . . under Section 75 . . . shall immediately subject the farmer and all his property . . . for all the purposes of this section [**not merely a part but all of the section** from (a) to (s)] to the exclusive jurisdiction of

the court . . ."; and the other provision in Section 75 (n) (as so amended) that . . . "Where deed had not been delivered, the period of redemption shall be extended . . . for the period necessary for the purpose of carrying out this section," that is the whole section, from (a) to (s). The words **"this section" mean the entire Section** 75 (a) to (r) and (s), **not part of it.**

Since Wilcons and his lands were in the exclusive jurisdiction of the federal court for more than a year after the mortgage holders took deeds in foreclosure from the state court therefore the decision is indeed very questionable because this Court more than once has declared that a bankruptcy court is without power to divest itself of jurisdiction. *Isaacs* v. *Hobbs,* 282 U. S. 734, 739; *Gross* v. *Irving,* 289 U. S. 343, 344; *Taylor* v. *Sternberg,* 293 U. S. 470, 473; *Thompson* v. *Magnolia,* 309 U. S. 478, 483. Granting that the effect of Section 75 (o) had expired, Section 75 (n), which reposed exclusive jurisdiction in the federal court and extended the state redemption period for all purposes of Section 75 still applied. The decision of this court in *Wright* v. *Union Central,* 304 U. S. 502, was not considered by the Circuit Court of Appeals in the Wilcons case although it had been announced the previous year.

But even if this Wilcons decision were good law there was in it **no lack of due process by want of notice and hearing.** It is not authority for the suggestion that the Kalb dismissal is *res judicata.* Each step in both Wilcons cases was the subject of hearings. Full hearings were had before the conciliation commissioner and before the District Court. Having observed the proprieties of the law by giving the farmer debtor his full day in court on every issue in accordance with due process the court no doubt had the "power to decide erroneously."

In re Oyler.

2. *In re Oyler,* 20 Fed. Supp. 595 (1936) (District Court of Ohio), is cited and quoted at pages 21 to 23 in the respondents' brief.

Because the respondents' brief has continued into this court two misstatements about this Oyler decision which were made in the court below, we relate the particulars. The respondents' brief does not truly state the issue and the case has no application. First misstatement: The respondents' brief (at the foot of page 21) says "the matter came before the court on the motion of a creditor for dismissal because of the failure of the debtor to make a *bona fide* offer of composition or extension of his debts. The motion was granted." Second misstatement: The respondents' brief (at the top of page 22) purports to quote from the report of the case in 20 Fed. Supp. 595, as follows: " 'Case comes up on motion of a creditor for dismissal because of the failure of the debtor to make a *bona fide* offer of composition or extension of his debts. Motion granted.' " The foregoing statement is not true, and the quoted paragraph does not appear in the report of the case in 20 Fed. Supp. 595, nor does it appear in 33 A. B. R. (N. S.) 738, nor in paragraph 4749 of Bankruptcy Law Service where the case is also reported. The Court expressly declined to consider "lack of good faith."

Following the enactment of the present Section 75 (s) on August 28, 1935, the District Court reinstated the case. The secured creditor moved to dismiss upon five grounds: (1) that the case was never pending under the original 75 (s); (2) that it was never pending under the new 75 (s), (3) and (4) that the new Section 75 (s) was unconstitutional; and (5) that the farmer debtor did not make a proposal in good faith.

After considering grounds (1) and (2) and deciding that the Oyler proceeding was never pending under either the original or the new Section 75 (s) and therefore could not be reinstated, the court said in the last sentence of the opinion: "The court does not deem it necessary to consider the other grounds urged for dismissal." The grounds thus not considered were (3) and (4) "unconstitutionality" and (5) "lack of good faith." Therefore, the statement in the respondents' brief ("the matter

came before the court on the motion of a creditor for dismissal because of the failure of the debtor to make a *bona fide* offer of composition or extension of his debts. The motion was granted") is not correct.

An examination of the case will disclose its inapplicability. On July 2, 1935, after the original Section 75 (s) was held invalid and before the present Section 75 (s) was enacted (thus leaving Section 75 (a) to (r) as the only and final procedure) the case was dismissed on the ground, which was put into an entry, that the commissioner was "unable to reach a conciliation agreement of composition or extension." This entry was approved by all parties "including the attorney for the debtor" as the decision states at one place. At another place the court said the order of dismissal was "acquiesced in by counsel for the debtor." Thus **the issue of dismissal without notice was not in the Oyler case.**

McWilliams v. Blackard.

(3) *McWilliams* v. *Blackard,* 96 F. 2d 43 (C. C. A. 8) (1938), is cited at page 23 of respondents' brief. This decision is also foreign to any subject involved here for it concerns only the doctrine of "The Law of the Case," which is that an issue once heard and decided erroneously becomes the law for that case if not appealed and reversed. This presupposes, of course, such process as "hears before it condemns."

In this instance, also two appeals were involved: *McWilliams* v. *Blackard* (86 F. 2d 328, decided in 1936), and the cited case, *McWilliams* v. *Blackard* (96 F. 2d 473, decided in 1938). In the first appeal the Court had held the new Section 75 (s) to be invalid in accordance with its Pamp decision. There was no application for certiorari. Thereafter this Court, in *Wright* v. *Vinton,* 300 U. S. 440, held it to be constitutional, expressly reversing the Pamp decision. The farmer debtor (relying chiefly upon the provision in the new Section 75 (s) as

it **then** was which read that "all cases that have been dismissed . . . because of the Supreme Court decision holding the **former Subsection (s)** unconstitutional shall be promptly reinstated . . .") applied for reinstatement which was granted. The creditor then moved to dismiss the petition. On appeal it was held that as no appeal had ever been taken from the original decision which h ld that Section 75 (s) was unconstitutional, it became "The Law of the Case." It rightly held that the new Section 75 (s) which **then applied** requiring reinstatement referred expressly only to decisions that the **former subsection (s)** was unconstitutional. Curiously enough, on the date of this decision, the new Section 75 (s) had shortly before been amended by **striking out the word "former,"** but the court did not consider the new amendment.

In re Archibald.

(4) *In re Archibald*, 14 Fed. Supp. 437, District Court of Minnesota (1936), cited at page 25 of respondents' brief.

This was another case which became involved in the unfortunate uncertainties arising out of the litigation over the constitutionality of the first and second Section 75 (s). A foreclosure sale was conducted while the petition under Section 75 (a) to (r) was pending. The sale was therefore void. *Kalb* v. *Feuerstein*, 308 U. S. 433. After the first Section 75 (s) was held invalid by this Court and before the present Section 75 (s) was passed, the conciliation commissioner filed his final report. This left the farmer debtor with no further proceeding possible, and the District Court dismissed the case. Shortly after the dismissal an owner of an undivided interest in the land conveyed it to the mortgagee-purchaser at the foreclosure sale. Before the statutory period of redemption of the remaining undivided interest had expired, the original farmer debtor filed a second petition under Sec-

tion 75 (a) to (r). After the expiration of the redemption period the mortgagee-purchaser moved to dismiss the case on the ground of (1) the lapse of the right of redemption; (2) prior dismissal; and (3) acquisition by the movant of an undivided interest.

The District Court held that having once invoked Section 75 (a) to (r), the farmer debtor could not again invoke it. This question of the right of a farmer debtor to file a second petition under Section 75 (a) to (r) is not in issue here and the Archibald decision is not applicable. Even upon the questions involved in it we think it is contrary to the decisions of this court in *Wright* v. *Union Central,* 304 U. S. 502; *John Hancock* v. *Bartels,* 308 U. S. 180; and *Borchard* v. *California Bank,* 310 U. S. 311.

In re Henderson.

5. *In re Henderson,* 100 F. 2d 820 (C. C. A. 5, 1938), is again discussed in the respondents' brief at pages 27 to 29.

As the respondents' brief at page 13 has already once relied upon the authority of the decision in the Henderson case as supporting *Massey* v. *Farmers,* 94 F. 2d 526, we have discussed the Massey decision at pages 11 to 12 of this brief and the Henderson decision at page 13 and shown that they have both been overruled by this Court in *John Hancock* v. *Bartels,* 308 U. S. 180. That decision of this Court upheld the dissenting opinion of Judge Hutcheson in the Henderson case in which he declared that the courts have no power to dismiss farmer debtor proceedings.

The Byerly Case.

6. We now come to *Union Joint Stock Land Bank* v. *Byerly,* 310 U. S. 1, which is discussed at pages 45 and 29 and 30 of the respondents' brief.

We understand the majority opinion of this Court in the Byerly case to have been that the bankruptcy court having expressly authorized the state court to proceed

with the sale in foreclosure, the officers of the state court were warranted in relying upon such authorization. This Court did not hold the order of the bankruptcy court to have been lawful; it expressly declared it was error to disregard Section 75 (o). This Court by the majority opinion held that despite the erroneous order of the bankruptcy court "the state court and its officer, the sheriff, were entitled in view of the District Court's plenary jurisdiction over the debtor and his property, to rely upon the order granting permission to make the sale" (Quoted from the bottom of page 7 of the majority opinion).

It is also to be noted in the Byerly case that (1) there was **no dismissal without notice** for it was upon the application of the farmer debtor, and (2) while the case was so dismissed the state court confirmed the sale which had been held by express authorization from the bankruptcy court.

The differences between the Byerly situation and that in this Kalb case are apparent. Here the rights of all parties remain exactly as they were when Mr. Kalb's farmer debtor case was dismissed out of the bankruptcy court. The respondents are still illegally holding possession and Mr. Kalb is still wrongfully deprived of possession. In the meantime this court has reversed the erroneous holding of the Wisconsin courts that the respondents were rightfully in possession and Mr. Kalb was lawfully evicted.

V.

REPLY TO THE RESPONDENTS' ARGUMENT V THAT (A) THE ORDER OF MARCH 17, 1936, IS NOT NOW APPEALABLE AND (B) THE APPEAL FROM THE ORDER OF APRIL 16, 1940, SEEKS A REVIEW OF THE PRIOR ORDER AND SHOULD BE DISMISSED (Pages 30 to 34 of the Respondents' Brief).

The respondents, utterly ignoring the application for rehearing which was accepted by the Court, entertained by it, and denied, contend that the appeal was not timely

because it was taken more than forty days after the dismissal by the order of March 17, 1936 (R. 11). This Court has repeatedly held to the contrary.

The order of March 17, 1936, was void *ab initio* because it was without notice and it remained so. There being no intervening rights, the property and the parties standing precisely as they stood at the time of the dismissal, the lapse of time is immaterial.

Thatcher v. *Powell,* 19 U. S. (6 Wheat.) 119 (1821). Sale for taxes without notice in 1808. Ejectment sued out and sustained. (Date of suit not given but it was later than 1814.) "In summary proceedings . . . those facts ought to appear, in order to show that its proceedings are *coram judice.*"

Shriver v. *Lynn,* 43 U. S. (2 How.) 43 (1844). Court ratified void sale in 1813. Action in ejectment brought in 1817 (4 years later) sustained. "A decree without notice would be treated as a nullity."

Boswell v. *Otis,* 50 U. S. (9 How.) 336 (1850). Sheriff's sale in 1832. Ejectment brought about 1846 (after 14 years) sustained. "No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defense."

Mitchell v. *St. Maxent,* 71 U. S. (4 Wall.) 237 (1866). Sale on execution without notice to new parties about 1827. Ejectment brought at a date not given. (Case argued in this Court in 1866.) It was argued that the original action being *in rem* lack of notice was not vital. The ejectment was sustained. "Void process confers no right on the officer to sell, and all acts done under it are absolute nullities."

The application of the petitioner for rehearing of the order of dismissal, and its consideration by the District Court suspended or obliterated the finality of the order of dismissal.

There are no terms in a bankruptcy court. No vested right had accrued to the respondents or to anyone else when the application for rehearing and reinstatement were presented. The respective property rights of all persons remain unchanged. **The denial of the application for rehearing fixed the date from which the time for appeal began to run.** The appeal was specifically taken from the order of March 17, 1936 (R. 28, folio 39). The reason for this rule which suspends the finality of an order when an application to rehear it is received and entertained is, no doubt, that it gives the lower courts the fullest opportunity to correct their errors by reconsideration. The result is that there are fewer cases to be reviewed in the higher courts.

Discussion of the Foregoing Statement.

No change whatever took place in the respective rights of the petitioner and the respondents from the entry of the order of dismissal of the farmer debtor proceeding without notice (R. 11) until the application for rehearing and for reinstatement (R. 12 to 17). No new or different rights had become vested. Indeed the decision of this Court in *Kalb* v. *Feuerstein,* 308 U. S. 433, determined that the possession of the respondents was and always had been unlawful and void.

There being no terms in a court of bankruptcy and there having been no change in the respective rights of the mortgagor and the mortgagees, the **entertainment** and **careful consideration** by the bankruptcy court of the application for rehearing, and its **denial of the application** gave the petitioner the right of appeal within the statutory period running from the order of April 16, 1940 (R. 26), which denied the application for rehearing.

Wayne v. Owens.

The precise argument presented here by the respondents was presented to this court in *Wayne* v. *Owens-Illinois,* 300 U. S. 131, and rejected. At page 136, in the

last sentence of the first paragraph of the opinion, it is said:

> "It is true the bankruptcy court applies the doctrines of equity, but the fact that such a court has no terms, and sits continuously, renders inapplicable the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended."

At the bottom of page 137:

> "On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case on the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry."

Gypsy v. Escoe.

Gypsy v. *Escoe*, 275 U. S. 498:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing. *Morse* v. *United States*, 270 U. S. 151, 153, 154, 70 L. Ed. 518, 519, 520, 46 Sup. Ct. Rep. 241.
>
> If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

In the present case there was no application for leave to file the petition for rehearing. No such application for leave was necessary. The court **accepted** the petition

for rehearing, **entertained** it, and after **careful consideration denied** it.

Supreme Court Advisory Committee.

The Chairman of the Supreme Court Advisory Committee in the formulation of the new Federal Rules of Civil Procedure said on the subject:

> "Of course, there is nothing in the rules about that, but the well-established rule in the federal courts is that **where time for appeal starts running on a judgment and a party makes a motion** for a new trial or **to set the judgment aside,** and that motion is made seasonably, it not only stops the running of the time but takes away the finality of the judgment for the purposes of appeal, and **the time for appeal then doesn't commence to run until the motion is denied. When it is denied, then you have your full time after that motion is denied to make your appeal.** It does not merely cut out a section of time but it destroys the finality of the judgment, and **even though the time for making a motion for a new trial** under the rules **has ended, if you make a motion for leave to file a motion for a new trial after the time has expired,** even though it isn't seasonable, **and the lower court entertains your motion on the merits and then decided it**—that has obliterated the finality of the judgment and **you don't have to take an appeal until the three months or thirty days,** as the case may be, **from the time the order is made denying your motion** for a new trial." Quoted from the statement of Honorable William D. Mitchell, reported in "Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute," Cleveland, 1938, page 371.

Notes 10 and 11 appended to *Wayne* v. *Owens-Illinois,* 300 U. S. 131, and in *Gypsy* v. *Escoe,* 275 U. S. 498, refer to several previous opinions of this court, among them the following:

Morse v. United States.

Morse v. *U. S.*, 270 U. S. 151 (1926). In the opinion, Chief Justice Taft at pages 153 and 154 said:

> "There is no doubt under the decisions and practice of this court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that **the time within which the proceedings to review must be initiated begins from the date of the denial of either the motion or the petition.**"

Brockett v. Brockett.

In *Brockett* v. *Brockett*, 43 U. S. (2 How.) 238 (1843), Justice Story at page 240 of the opinion said:

> "The next ground is that an appeal has been taken from the refusal of the court below to open the former decree rendered for the appellant. It is plain that no appeal lies to this court in such a matter as it rests merely in the sound discretion of the court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But **an appeal has also been taken to the first decree** (which was a final decree) rendered by the court . . . now the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a supersedeas, or to stay execution of the decree; because to have such an effect the appeal should be made and the bond should be given ten days after the final decree. But the short and conclusive answer to this objection is that the **final decree** of the 10th of May **was suspended by the subsequent action of the court**; and it did not take effect until the 9th of June, and that **the appeal was duly taken** and the appeal bond given **within ten days from the last period.**"

Hughes on Federal Practice.

The text writers on federal practice state the rule as so announced. For example: Hughes, "Federal

Practice," Section 5437: "Under the decisions and practice of the Supreme Court a motion for a new trial in a court of law or a petition for a rehearing in a court of equity, duly and seasonably filed, suspends the running of the time for taking an appeal, so that **the time within which the proceedings to review must be initiated begins to run from the date of the denial of either the motion or petition.**" Also Section 5698: "The time within which an appeal may be taken begins to run from the date of entry of the judgment or decree, unless **a petition for rehearing has been made** at the same term, **and is entertained** by the court, in which case the **time limited for an appeal does not begin to run until the application is disposed of,** though this is at a subsequent term, . . ."

In re Price.

The court below applied this rule to farmer debtor proceedings under similar circumstances in *In re Price*, 99 F. 2d 691 (C. C. A. 7), cited in *Union Joint Stock Land Bank* v. *Byerly*, 310 U. S. 1, 16. The court there said:

> "We are of the opinion that the action of the court in thus dismissing the proceedings [without notice] and allowing the deed to issue should not be permitted to prejudice the debtor's rights to proceed in accordance with the provisions of the statute. Under the ruling of the Supreme Court in *Wayne* v. *Owens-Illinois*, 300 U. S. 131, the court 'has the power, for good reason, to revise its judgment upon seasonable application and before rights have vested on the faith of its action.' There the court held that a court of bankruptcy might, in the exercise of sound discretion, reopen an order dismissing a petition for reorganization under Section 77B of the Bankruptcy Act and rehear the matter on the merits, notwithstanding that the time for appeal had elapsed. We think that case is authority for the action of court in reopening the proceeding here, in effect vacating the order of dismissal, and preventing the use by appellant of rights wrongly obtained by authorization of the issue of the master's deed at a time when

the debtor was entitled to consider that his proceeding under Section 75 was still pending."

Carpenter v. Condor.

Similar procedure was sustained in *Carpenter* v. *Condor,* 108 F. 2d 318 (C. C. A. 9), where the court said at the close of its decision:

> "The time for appeal began to run upon the denial of the petition for rehearing (*Morse* v. *U. S.,* 270 U. S. 151) although it would have been otherwise had the petition not been 'entertained.' *Wayne* v. *Owens-Illinois,* 300 U. S. 131, 137. The petition herein having been entertained, the appeal was in time."

Bowman v. Lopereno.

During the present term in *Bowman* v. *Lopereno,* ..... U. S. ....., 61 S. Ct. 201, this court reaffirmed the principle. At page 203, end of second column, it was said: "The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a **motion for leave to file** such a petition out of time, if not acted on or if denied by the trial court, can not operate to extend the time for appeal. But **where the court allows the filing, and after considering the merits, denies the petition, the judgment of the court as originally entered does not become final, and the time for appeal runs from the date thereof."**

Unquestionably the appeal was taken in accordance with long established federal court rules.

Discussion of Authorities Cited in the Respondents' Fifth Proposition.

1. Section 25 (a), Bankruptcy Act, cited at page 31 of respondents' brief:

The respondents argue that no appeal may be taken after forty days from the entry of the judgment. They quote Section 25 (a) of the Bankruptcy Act. It reads: "Appeals . . . shall be taken within thirty days, . . ., or, if

. . . notice be not served and filed, then within forty days" (This is Section 25 (a) of the Act of 1938. Under the act of 1898 it was the same as to thirty days. The forty day provision did not then exist). This time limitation of course presupposes a valid judgment which, as Daniel Webster said in his oft quoted expression in the Dartmouth College case, "hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

By the reasoning of the respondents a judge having a dull day might render a judgment without previous notice that it is to be then heard, without hearing and without any notice of the judgment. That is, he might merely draw an order and pass it to the clerk for entry. The party affected by such a purported judgment after thirty days under the 1898 statute (applicable here), or after forty days under the 1938 statute, would, by respondents' reasoning, be devoid of all remedy. Or, applying that reasoning further, if the creditors of an individual should allege the elements of involuntary bankruptcy by proper petition and proof in court and the court, without notice to the alleged bankrupt, adjudicates him a bankrupt, that unfortunate individual would have no remedy if such adjudication remained without appeal for forty days!

Mintz v. Lester.

2. *Mintz* v. *Lester*, 95 F. 2d 590, cited at page 32 of the respondents' brief: In this case the appellant Mintz **appealed only from the motion for a rehearing.** There was **no appeal from the original order** of dismissal. The petition for appeal as set out in the opinion was: "Comes now Minnie E. Mintz . . . and prays that she be granted an **appeal from the final order . . . denying her motion for a rehearing . . .**" The appeal was therefore limited to the denial of the application for a rehearing, and it was properly denied. Mr. Kalb not only appealed from the orders

of April 16, 1940 (R. 26), and April 17, 1940 (R. 28), but from the final order of March 17, 1936 (R. 11).

Marcy v. Miller.

3. *Marcy* v. *Miller,* 95 F. 2d 611, cited at page 33 of respondents' brief: This appeal expressly appealed from an order overruling a motion to reinstate proceedings. **There was no appeal from the original order of dismissal.** The court said, "An order made in a proceeding in bankruptcy may be reviewed only on an appeal from it, not on appeal expressly taken from a subsequent order entered after the time allowance for appeal from the former order has expired." The effect of an application for rehearing was not mentioned.

In re Irving-Austin.

4. *In re Irving-Austin Building Corporation,* 96 F. 2d 905, cited at page 33 of the respondents' brief: In Section 77B proceedings a creditor appealed from an order confirming a plan of reorganization. On the appeal the creditor objected to a previous order of classification, which had been heard and finally decided without either objection or appeal. The court very properly held that "An order in a bankruptcy proceedings, from which appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order." The effect of an application for rehearing was not suggested or considered.

CONCLUSION.

It seems to the petitioner clear that the opposition of the respondents has not disproved the grounds for certiorari as stated in the petition for certiorari, namely that:

First. The restraining order is in direct conflict with the decision of this court in *Kalb* v. *Feuerstein,* 308 U. S. 433. It is also directly contrary to the holding of the bankruptcy court that it had no authority or power to issue it.

Second. The petitioner was deprived of due process of law by the dismissal of his proceeding without notice, either before or after the dismissal. The dismissal rendered the decision of this court in *Kalb* v. *Feuerstein*, 308 U. S. 433, moot and without effect when it was rendered. It rendered ineffective the ten unanimous decisions of this court that every farmer debtor is entitled to the benefits of Section 75 in full accord with the spirit and purpose sought to be attained by the Congress in enacting it. The dismissal is a departure from accepted legal principles and judicial procedure. The decision of the district court and of the appellate court below is in direct conflict with the previous decisions of that appellate court and of the federal courts of other circuits.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio,
WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

Lima, Ohio.
April 12, 1941.

(22)

FILED
MAY 21 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 816.

ERNEST NEWTON KALB, PETITIONER,

VS.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, RESPONDENTS.

PETITION FOR REHEARING.

ELMER MCCLAIN,
Lima, Ohio,
WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

INDEX

Petition for Rehearing 1
Certificate of Counsel 5

Table of Cases

Union Land Bank vs. Byerly, 310 U. S. 1 3
Kalb vs. Feuerstein, 308 U. S. 433 5

Acts

Bankruptcy Act, Section 75 2
Act of March 3, 1933, Section 75 (q) 2, 3
Act of March 3, 1933, Section 75 (n) 4
Act of March 3, 1933, Section 75 (o) 4
Act of 1938 4

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 816.

ERNEST NEWTON KALB, PETITIONER,

VS.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, RESPONDENTS.

PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court of the United States:

The petitioner respectfully presents his petition for rehearing of the denial of his petition for certiorari.

I.

Your petitioner respectfully urges that the Circuit Court below has sanctioned such a departure from the accepted and usual course of judicial procedure by the bankruptcy court as to call most urgently for the exercise of the power of supervision exercised by this Court. He be-

Note: All emphasis in this petition is supplied.

lieves that the Circuit Court below has decided a federal question in a way that has not been finally settled by this court. He believes that a principle of far reaching importance to the general public is here involved.

Although the principles contended for by the petitioner are of great importance to him personally they are of far greater importance to the public and to the largest single element of the population, that engaged in agriculture. The majority of this element are financially embarrassed not because of any fault in the farmers themselves but because of long standing public policies which Section 75 of the Bankruptcy Act belatedly has attempted to alleviate. He believes that the dismissal order of the bankruptcy court below, together with similar orders of other such courts, has thwarted the fixed national policy which was adopted and steadfastly maintained by six Congresses, in two presidential administrations, and repeatedly sustained by this court in eleven unanimous decisions.

II.

It was the legislative intent that Section 75 of the Bankruptcy Act should secure to financially distressed farmer debtors, **quick, certain, and definite relief, free from legal technicalities.** It was expected that the bankruptcy courts would actively guarantee to farmer debtors the full protection of the Act.

The Act of March 3, 1933, in Section 75 (q), which has never been changed, charged the bankruptcy courts to protect the procedural rights of a farmer debtor in pending proceedings.

Section 75 (q) reads:

"A conciliation commissioner shall upon request **assist any farmer debtor in preparing and filing a**

petition under this section **and in all matters subsequent thereto** arising under this section and **farmers shall not be required to be represented by an attorney** in any proceeding under this section."

The Act created a brand-new law, office, and officer. In the same breath that it created them it emphatically **enjoined the duty of effectuating the policy of the law —not its defeat.** Section 75 (q) thus emphasized the legislative mandate in three ways:

First: It required the conciliation commissioner to **assist the farmer debtor in preparing his petition.**

Second: It required the conciliation commissioner to **assist the farmer debtor in all subsequent proceedings.**

Third: It expressly stated that **"farmers shall not be required to be represented by an attorney."**

The report of the conciliation commissioner at R. 11, folio 12, shows that the farmer debtor did not have counsel at the various creditors' meetings.

III.

Farmer debtors have confidently relied upon Section 75 (q) and trusted bankruptcy courts to preserve their rights under Section 75. Yet the bankruptcy courts have repeatedly violated the most fundamental and ancient dogma of English and of American jurisprudence that no person shall be deprived of a right without due process of law—that he shall have due notice and an opportunity to be heard—in short that he shall have his day in court.

In *Union Land Bank* v. *Byerly*, 310 U. S. 1, in which three justices vigorously dissented at pages 11 to 16, the farmer debtor did not know for **eleven months** that the

bankruptcy court had without notice and without hearing entered an unlawful order to sell his farm contrary to Section 75 (n) and in violation of the express prohibitions of Section 75 (o) and also contrary to the bankruptcy court's own restraining order prohibiting the sale. His first knowledge of the order came when the state court **confirmed the foreclosure sale eleven months after it occurred.** Then it was too late, by the majority opinion of this Court, to seek a remedy.

In this Kalb case the conciliation commissioner, without notice, without hearing and without reason, recommended dismissal to the Judge of the bankruptcy court. The bankruptcy court on the same day of the secret recommendation, without notice and without hearing, unlawfully dismissed the entire farmer debtor proceedings. The actions of both conciliation commissioner and bankruptcy court were not only unlawful but **void.**

IV.

Despite the provisions for protection in Section 75 (q) which the Congress put into Section 75 in addition to the constitutional mantle of due process it has come about in practice that farmer debtors, alone of all classes of applicants to the courts for legal redress, are required to keep up an impossible degree of vigil and surveillance over court procedure in their cases.

Farmers necessarily live away from the seats of the bankruptcy courts. The sheer impossibility of the farmer debtor keeping watch over the bankruptcy court to see that the court does not violate the law is evident. It has become necessary that he make periodical trips to the court at periods of less than forty days under the Act of 1938. He must have time after discovering an unlawful act to prepare his appeal or notice of appeal within the

appeal period. In Montana a farmer debtor could be required to travel more than 900 miles. In the little state of Vermont he might have to travel 80 miles. In one district in Illinois the trip would be 242 miles.

V.

Although the restraining order issued by the bankruptcy court which restrains your petitioner from taking the possession of his farm to which the decision of this Court in *Kalb* v. *Feuerstein*, 308 U. S. 433, declared him to be entitled, is not of such widespread importance because it is peculiar to this case, yet your petitioner suggests that it effectually destroys the practical effect of that decision and should be considered by this Court.

Wherefore your petitioner prays that the denial of his petition for certiorari be reconsidered and granted.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio,
WILLIAM LEMKE,
Washington, D. C.,
Attorneys for Ernest Newton Kalb, Petitioner.

Lima, Ohio,
May 14, 1941.

Certificate of Counsel.

As one of counsel for the Petitioner I certify that the within petition for rehearing is presented in good faith and not for delay.

ELMER MCCLAIN,
One of Counsel for Petitioner.